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In The Supreme Court of the United States

MARLIN LEE MILLS,

Petitioner,

v.

JOSEPH P. MEADOWS, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Because law enforcement officers should not be subjected to varying levels of First Amendment protection in different states, Petitioner Marlin Lee Mills respectfully requests that this Court resolve splits in the Circuits on the following issues:

I. **Considering this Court's holdings in *Elrod* and *Branti*, do sheriffs have the unrestricted power to fire deputies on the basis of political affiliation regardless of whether such affiliation has any connection with their job responsibilities?**

II. **Before firing a deputy in retaliation for his political expression and campaign activity, must sheriffs demonstrate a disruptive impact which outweighs the employee's First Amendment interests in light of this Court's holdings in *Pickering* and *Connick*?**

III. **Where deputies are allegedly discharged both on the basis of their political affiliations and on the basis of their political expression and campaign activities, should the Circuits apply this Court's tests in *Elrod-Branti*, *Pickering-Connick*, or both?**

PARTIES TO THE PROCEEDING

The parties to the proceeding before the Court of Appeals were Marlin Lee Mills, Joseph P. Meadows, and Harford County, Maryland.

Petitioner Marlin Lee Mills respectfully wishes to advise this Court of the interest of the National Association of Police Officers as *amicus curiae* in support of this Petition.

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Petitioner Marlin Lee Mills ("Mills"), respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Fourth Circuit and of the United States District Court for the District of Maryland can be found in Appendix A.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit ("Court of Appeals") was entered on July 22, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute,

> ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person with the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress. * * *

STATEMENT OF THE CASE

This case presents this Court with alleged First Amendment violations which have become all too common and which have been analyzed in a multitude of different ways by different Circuits.

After 23 years of dedicated service as a member of the Harford County Sheriff's Office, Mills was terminated from this police force by the first Republican Sheriff in Harford County history, Joseph P. Meadows ("Sheriff Meadows"). Without any basis for this termination, Sheriff Meadows cited Mills' political association with his Democratic predecessor, Robert Comes ("Comes"), and Mills' activities as president of the Harford County Democratic Club. J.A. 57-65. Although Mills had always maintained the highest standards of professionalism in his job, Sheriff Meadows forced this veteran law enforcement officer to retire on December 19, 1994. J.A. 106.

Having joined the Sheriff's Office in 1971, Mills served with distinction under the administrations of five separate sheriffs in Harford County. From 1990 through 1994, Mills served under the Comes administration. As the President of the

Harford County Democratic Club and as an active and concerned citizen of Harford County, Mills supported his fellow Democrat when the incumbent sheriff ran for re-election in 1994. Despite Mills' support, Sheriff Comes lost to his Republican challenger. J.A. 105.

Just after taking office, Sheriff Meadows questioned other members of his office about Mills' support for the Democratic incumbent, J.A. 14, 61-62, and without any act of disloyalty on the part of Mills, "concluded that [he] could not trust Mills." J.A. 63. Sheriff Meadows then confronted Mills and accused him of being a close personal friend and confidant of his Democratic predecessor. J.A. 105. Having "determined that there was no place for Mills ... and that he would not be a happy and supportive deputy," *id.*, Sheriff Meadows ultimately told Mills "that there is no place you will fit into the organization and I am letting you go." J.A. 106. Based upon Sheriff Meadows' order that he vacate the office immediately, Mills reluctantly complied with that order and, after 23 years of dedicated service, was terminated from the Harford County Sheriff's Office. *Id.*

Rather than dispute his political motivation for terminating Mills, Sheriff Meadows provided an Affidavit confirming it. J.A. 57-69. According to Sheriff Meadows, immediately after being sworn into office, he met with his subordinates to determine "their reaction to my election." J.A. 60. Before obtaining Mills' reaction, Sheriff Meadows "explained to Mills that [he] was unsure what his future status with the office would be." *Id.* Indeed, Sheriff Meadows admits that he was quite concerned about Mills' close political ties to his predecessor:

I knew Mills was a devoted supporter of Comes

> and Comes' bid for re-election. ... Mills had hosted a political fundraising event for Comes at the private swim and golf club owned by Mills. Mills had placed a billboard-size sign at the entranceway to the club which supported Comes' re-election bid. I saw Mills outside of Comes' campaign headquarters on the night of the Democratic primary when Comes defeated the Democratic challengers for Sheriff. I knew Mills to be an ardent Comes supporter.

J.A. 61. Justifying this politically-motivated dismissal, Sheriff Meadows informed the lower courts that he "had a reasonable basis to distrust Mills, who was one of two deputies who orchestrated the campaign for re-election of Meadows' opponent, Comes, and could reasonably be expected to do whatever was within his power to make Meadows' term in office unsuccessful so that Comes could mount a challenge to Meadows' candidacy at the next election." J.A. 46-47.

Contrary to these paranoid predictions, Mills fully intended to serve the new sheriff with undivided loyalty. As he had done under five previous administrations, Mills informed Sheriff Meadows that he "was ready, willing and able to serve with similar diligence and distinction under his administration." J.A. 107. Even as Sheriff Meadows fired him, Mills "never expressed any reluctance to serve him loyally." J.A. 108.

Though Sheriff Meadows' affidavit shows that Mills' political support and allegiance to his predecessor played a substantial and decisive role in his ultimate termination, *see* J.A. 63 (justifying Mills' termination on basis of his "loyalty to Comes"), Mills did not play a policymaking role within the Comes' administration and his political affiliation and activity

never had any bearing on his duties or fitness for office. J.A. 105-06. Moreover, Mills "never held a position based upon political appointment or patronage." J.A. 108. While Mills supported Comes' reelection bid, he never conducted any type of political activity during business hours or otherwise while on the job, *id.*, and there is no suggestion in the record that Mills conducted any type of political activity at any time following the election.

Deprived of a career which he held proudly for 23 years, Mills filed an eleven count Complaint seeking reinstatement to his previous job, compensation for lost wages and compensatory and punitive damages arising out of, *inter alia*, Sheriff Meadows' violation of his First Amendment rights. J.A. 5-26. In response to these claims, Harford County moved to dismiss this case and Sheriff Meadows filed a Motion for Dismissal/Summary Judgment. J.A. 27-33; 34-56.

Despite pleadings and affidavits confirming the politically-motivated dismissal of Mills, the District Court disregarded Mills' First Amendment rights by entering summary judgment for both of these defendants on April 16, 1998. A-7-16. While recognizing the protected nature of Mills' political activity, the District Court gave Sheriff Meadows carte blanche to dismiss him for political reasons. *See id.* In so doing, the District Court blatantly ignored First Amendment interests which this Court has long protected.

Although this Court has long held that politically-motivated dismissals may only be justified where "the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved," *Branti v. Finkel*, 445 U.S. 507, 518 (1980); *Elrod v. Burns*, 427 U.S. 347 (1976), the District Court refused to

impose this burden on Sheriff Meadows. Instead, it echoed the Fourth Circuit's departure from this Court's standards by blindly asserting "that political affiliation 'serves as a proxy for loyalty to the sheriff,' and that loyalty is an appropriate job requirement." A-8. Thus, while this Court demands proof of impaired performance, the District Court found that, regardless of a deputy's function, political affiliation will always justify termination. *See id.*

Beyond political affiliation, the District Court also disregarded Mills' right to campaign for the candidate of his choice. Giving lip service to this Court's decisions in *Pickering v. Board of Educ. Of Township High School Dist. 205*, 391 U.S. 563 (1983), and *Connick v. Myers*, 461 U.S. 138 (1983), the lower court conceded that "[t]here is no question that in this case Mills engaged in speech involving a matter of public concern." A-10. Although it is virtually impossible to understand how Mills' *pre-election* political activity could have impaired the efficiency of Sheriff Meadows' office, the District Court permitted him to fire Mills without any evidence of dissent, disruption or disloyalty. *Id.* Lacking such evidence, the District Court held that Sheriff Meadows' speculative concerns about "the effective and efficient fulfillment of the responsibilities of the Sheriff's Office outweighed Mills' interest in exercising his First Amendment rights." *Id.*

Wishing to redress Sheriff Meadows' and the District Court's disregard for First Amendment rights, Mills appealed the District Court's decision on May 14, 1998. J.A. 160. Unfortunately, the Court of Appeals disregarded this Court's holdings even more than the District Court and widened a growing split in the Circuits over the proper method of analyzing cases involving alleged dismissals on the basis of both political affiliation and political expression. While the

District Court at least acknowledged the holdings of *Pickering* and *Connick* before departing from established law, the Court of Appeals never even mentioned these landmark decisions and failed to address First Amendment protections for Mills' campaign activity. *See generally* A-1-6. In failing to conduct this analysis, the Court of Appeals not only departed from established law, it split from other Circuits who continue to conduct this analysis. *Id.*

Although the Court of Appeals acknowledged the existence of this Court's decisions in *Elrod* and *Branti*, it ignored these holdings, failed to analyze whether political affiliation related to job performance, and vested the Sheriff with the unfettered discretion to fire subordinates from other political parties. *Id.* While the Court of Appeals may feel that an "unpublished opinion" permits it to exercise poetic license on the law, the lower courts' opinions sharply conflict with this Court's First Amendment analysis, split from several circuits who continue to follow this Court's mandate, and impermissibly dilute the most fundamental of our constitutional freedoms.

REASONS FOR GRANTING THE WRIT

Although this Court has long "conclude[d] that policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights," *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967), the Court of Appeals has effectively eliminated these rights while accentuating a split in the circuits that leaves law enforcement officers subject to different levels of protection in different states. In campaigning on behalf of Sheriff Comes, Mills hardly committed a crime for which he should be punished with the loss of his career. Instead, this president of the Harford County Democratic Club

exercised one of the most clearly established rights in the United States Constitution. As this Court observed in the landmark decision of *Buckley v. Valeo*, 424 U.S. 1, 14 (1976), *quoting Roth v. United States*, 354 U.S. 476 (1957), "[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"

Without making any exception for law enforcement officers, the First Amendment was primarily designed to protect every citizen's right to participate fully in the electoral process:

> As Madison observed in 1800, just nine years after ratification of the First Amendment: "Let it be recollected, lastly, that the right of electing the members of the government constitutes more particularly the essence of a free and responsible government. The value and efficacy of this right depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively."

Harte-Hanks Comm., Inc. v. Connaughton, 491 U.S. 657, 687 (1989), *quoting* 4 J. Elliot, Debates on the Federal Constitution 575 (1861).

Beyond the expression inherent in campaign activity, the First Amendment guarantees to citizens like Mills the right to engage in whatever political affiliations suit them. The right to associate in order to express one's views is "inseparable" from the right to speak freely. *Thomas v. Collins*, 323 U.S. 516, 530 (1945). The "right of free association [is] a right closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society." *Shelton v. Tucker*, 364 U.S. 479, 486 (1960); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984)("implicit in the right to engage in activities protected by the First Amendment [is] a corresponding right to associate with others in pursuit of a wide variety of political ... ends").

Considering the vital importance of such political activity, it has long been established that government officials "may not condition public employment on an employee's exercise of his or her First Amendment rights." *O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712, 116 S. Ct. 2353, 2356 (1996), *citing Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Pickering v. Board of Educ. of Township High School Dist. 205*, 391 U.S. 563 (1968). "[I]f the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. That would allow the government to 'produce a result which [it] could not command directly.' Such interference with constitutional rights is impermissible.'" *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

While the lower courts would prefer to ignore it, one does not lose these constitutional rights upon becoming a law enforcement officer. Neither Sheriff Meadows nor any other government official may condition a law enforcement officer's

job on loyalty oaths, political expression, campaign activity or political affiliation. Simply put, even the mere "'threat of dismissal for failure to provide [support for the favored political party] unquestionably inhibits protected belief and association, and dismissal for failure to provide support only penalizes its exercise.'" *O'Hare Truck Service* , 116 S. Ct. at 2357 (brackets in original), *quoting Elrod v. Burns*, 427 U.S. 347, 359 (1976). By giving sheriffs and police chiefs the absolute discretion to penalize these rights by terminating political opponents, the lower courts have engaged in an unconstitutional campaign of their own which this Court must address.

I. THE LOWER COURTS ARE IGNORING THE FIRST AMENDMENT BY PROVIDING SHERIFFS WITH THE UNRESTRICTED POWER TO TERMINATE MEMBERS OF OTHER POLITICAL PARTIES

Contrary to the lower courts' conclusions, Sheriff Meadows may not justify his termination of Mills on the basis of his political affiliation and active support of an opposing political party. Although neither court actually applied this Court's holding in *Branti*, "the ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." 445 U.S. at 518.

Rather than require Sheriff Meadows to follow this law and demonstrate that Mills' party affiliation was an appropriate requirement for the effective performance of his job, these courts refused to analyze this issue, summarily rejected Mills'

contentions to the contrary, and would not even permit discovery on the nature of his responsibilities. Instead, the trial judge echoed the Court of Appeals' earlier departures from this Court's standards by blindly asserting "that political affiliation 'serves as a proxy for loyalty to the sheriff,' and that loyalty is an appropriate job requirement." Confirming that politics may always justify dismissals regardless of a deputy's function, the Court of Appeals affirmed this holding by arguing that such deputies are "alter egos" of sheriffs whose very election provides the unrestrained power to fire those from another party – regardless of whether politics plays a role in their jobs.

Not only do these holdings ignore that of *Branti*, they fly in the face of this Court's decision in *Elrod*. Under facts quite similar to those confronting the lower courts, a plurality of this Court upheld a deputy sheriff's right to sue for dismissals based upon political affiliation. *Elrod*, 427 U.S. 347. There, several deputies alleged that Sheriff Elrod fired them because they were affiliated with a different political party and did not support his election efforts. Although Sheriff Elrod moved to dismiss these claims, this Court held that such politically-motivated dismissals are "unconstitutional under the First and Fourteenth Amendments" and that these deputies "stated a valid claim for relief." *Id.* at 373.

Here, Sheriff Meadows has admitted in his own Affidavit that he dismissed Mills for the very same reasons articulated by Sheriff Elrod. *See* J.A. 57-69. Although Mills remained the president of the Harford County Democratic Club even after the election, Sheriff Meadows has failed to show that this political affiliation had any bearing on his fitness for duty. In fact, Sheriff Meadows even admitted that party affiliation was not an appropriate requirement for Mills' job, claiming that, even in the case of upper level command positions, party

"affiliation had absolutely nothing to do with who I appointed." J.A. 63. Based upon these admissions, Sheriff Meadows cannot legitimately justify his termination of Mills on the basis of such political considerations as party affiliation. Yet, in departing from *Elrod* and *Branti*, the lower courts never required that Sheriff Meadows justify his decision to terminate Mills and held that politics will always prevail. Because this perversion of the law blatantly undermines the First Amendment and actually invites its violation, this Court should intervene.

II. WHILE SOME CIRCUITS HAVE FOLLOWED THIS COURT'S MANDATE IN *ELROD* AND *BRANTI*, OTHERS HAVE DISREGARDED THE FIRST AMENDMENT BY PERMITTING WIDESPREAD POLITICAL DISMISSALS

The Court of Appeals' latest departure from this Court's analytical framework solidifies a split in the Circuits which leaves law enforcement officers' First Amendment rights in an uncertain posture and which "cries out for elucidation from the Supreme Court in some appropriate future case." *Cutcliffe v. Cochran*, 117 F.3d 1353, 1361 (11th Cir. 1997). While this Court has yet to examine this disturbing trend, the time has come to clarify and to reaffirm the political freedoms guaranteed by the First Amendment.

Law enforcement officers should not be required to "check their local listings" before registering with a political party. This is particularly true where, as here, political affiliation has nothing to do with the officers' duty to protect the public. Yet, in five Circuits, law enforcement officers have greater freedom to register with the party of their choice than do those officers who protect the public in the Fourth, Seventh

and Eleventh Circuits. While the Fourth, Seventh and Eleventh Circuits have provided sheriffs with the unfettered discretion to dismiss deputies from another party, *see Upton v. Thompson*, 930 F.2d 1209 (7th Cir. 1991), *cert. denied*, 503 U.S. 906 (1992); *Terry v. Cook*, 866 F.2d 373 (11th Cir. 1989), the Third, Fifth, Sixth, Ninth and Tenth Circuits have placed limits on such politically-motivated dismissals. In these Circuits, judges have followed *Branti* by examining the plaintiff's actual job responsibilities and determining whether political affiliation is an appropriate job requirement. *See, e.g., Burns v. County of Cambria, Pennsylvania*, 971 F.2d 1015 (3d Cir. 1992), *cert. denied*, 506 U.S. 1081 (1993); *Brady v. Fort Bend County*, 58 F.3d 173 (5th Cir. 1995); *Barrett v. Thomas*, 649 F.2d 1193 (5th Cir. 1981), *cert. denied*, 456 U.S. 925, 936 (1982); *Hall v. Tollett*, 1997 WL 651344 (6th Cir. Oct. 22, 1997); *Thomas v. Carpenter*, 881 F.2d 828 (9th Cir. 1989), *cert. denied*, 494 U.S. 1028 (1990); *Dickeson v. Quarberg*, 844 F.2d 1435 (10th Cir. 1988).[1]

Even in those Circuits which have departed from the need to analyze job requirements and have permitted unchecked political dismissals, judges have repeatedly called for this Court's guidance on the appropriate level of analysis. For example, in *Cutcliffe*, 117 F.3d 1353 (11th Cir. 1997), the author of the panel's decision reluctantly ruled against the plaintiff on the basis of controlling precedent in the Eleventh Circuit, but called for en banc review because he deemed the precedent inconsistent with *Branti*. According to that jurist, "confusion in applying the *Elrod-Branti* standard is not surprising as there appears to be a conflict among the circuits

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[1] District courts in two other Circuits have also allowed deputy sheriffs to maintain these claims. *See Baum v. Webb*, 863 F. Supp. 918 (E.D. Ark. 1994); *AFSCME v. Morse*, 812 F. Supp. 278 (D.N.H. 1993).

in patronage cases arising in sheriff's offices." *Id.* at 1357. Furthermore, the Fourth Circuit's earlier en banc decision in *Jenkins v. Medford*, 119 F.3d 1156, 1171 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 881 (1998), involved a vehement dissent which expressed disbelief at "those courts that have improperly attempted to limit the *Elrod-Branti* holding." Contrary to the speculative concerns for government efficiency expressed by the majority, this dissenter warned of even more serious considerations: "Only time will tell the extent that the resulting loss of First Amendment freedoms ... will ... 'handicap[] and impede[] law enforcement' efforts." *Id.* (brackets in original).

Without this Court's guidance, time has continued to dilute the First Amendment rights of law enforcement officers as the Circuits continue to debate the appropriate level of analysis and officers must check the local law before registering to vote. Under these circumstances, this Court must clarify for all law enforcement officers the state of the law in all states.

III. BY IGNORING THE PROTECTIONS WHICH THIS COURT ESTABLISHED IN *PICKERING* AND *CONNICK*, THE COURT OF APPEALS HAS OPENED THE DOOR TO DISMISSALS DESIGNED TO PUNISH POLITICAL DISSENT

Where, as here, a plaintiff alleges that "a government employer take[s] adverse action on account of an employee or service provider's right of free speech," courts must apply the test outlined by the Supreme Court in a line of cases following *Pickering v. Board of Educ. of Township High School Dist. 205*, 391 U.S. 563 (1968) and *Connick v. Myers*, 461 U.S. 138 (1983). *O'Hare Truck Service*, 116 S. Ct. at 2357-58. Unfortunately, the Court of Appeals did not even acknowledge

the existence of these cases and failed to apply this Court's test for when an employee may be discharged in connection with the exercise of First Amendment rights.

Under this test, the lower courts should have first determined whether Mills' First Amendment activity focused on a matter of "public concern." *Id.* at 147-48. If so, these courts should have balanced "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568. Should the employer fail to prove an interest sufficiently monumental so as to outweigh the fundamental First Amendment interests of the citizen, he may not take any action adversely affecting the citizen's employment on that basis. *Id.*

By failing to apply this two-part test, the Court of Appeals joined Sheriff Meadows in ignoring Mills' First Amendment rights. After applying the *Pickering-Connick* test to Mills' activities, one could hardly justify any adverse job action taken in response to these activities. First, in campaigning on behalf of the Democratic incumbent, Mills engaged in political expression of such monumental public concern that it lies at the very heart of the First Amendment. *Buckley*, 424 U.S. at 14; *Roth*, 354 U.S. at 484; *Harte-Hanks Comm.*, 491 U.S. at 687.[2] Second, this citizen's interest in

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[2] Amazingly, the Court of Appeals refused to follow *Pickering* and *Connick* in connection with Mills' political campaign activity, but has applied these safeguards to prohibit adverse job actions on the basis of expression subject to even less constitutional protection than that of Mills. Expressly recognizing that "entertainment ranks lower on the scale of first amendment values than does pure political debate," the Court of Appeals prohibited the Baltimore City Police Department from taking adverse action

commenting upon matters of grave public concern far outweighs any dubious interest which his employer may have to censor it. Under the facts of this case, it is difficult, if not impossible, to determine how Mills' *pre-election* political activities could have impaired the efficiency of Sheriff Meadows' office. While Sheriff Meadows complained about Mills' support for his opponent prior to his election, he failed to produce any evidence showing that this employee expressed any dissent or disruption of any kind after Sheriff Meadows took office. Indeed, Mills himself stated that he was fully prepared, as a professional law enforcement officer, to serve Sheriff Meadows with the same degree of loyalty which he had exhibited on behalf of five previous sheriffs. J.A. 106-07. Because Sheriff Meadows has failed to prove a compelling state interest, or *any* interest, outweighing this citizen's First Amendment rights, he cannot legitimately claim a right to terminate Mills for the exercise of political activity which did not even encroach into the period of his administration.[3]

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against a law enforcement officer who performed an Al Jolson imitation wearing a "black-face" disguise. *Berger v. Battaglia*, 779 F.2d 992, 999 (4th Cir. 1985). According to the *Berger* court, even this type of expression deserved protection under a *Pickering-Connick* analysis. *Id.* Having refused to deny law enforcement officers "the full panoply of first amendment rights enjoyed by all citizens," *id.* at 1000, the Court of Appeals established Officer Berger's right to engage in such expression without fear of adverse consequences. *Id.* Considering the fact that such "lower-ranked" entertainment acts command such protection, Mills' right to engage in activities placed at the very top of the First Amendment scale is beyond question.

[3] Lacking such evidence, the District Court attempted to justify its decision on the basis of a Fourth Circuit opinion which only served to underscore the violation at issue. In *Joyner v. Lancaster*, 815 F.2d 20 (4th Cir. 1987), this Court upheld the dismissal of one of the top three officials in the sheriff's office who actively campaigned against the *incumbent*

Without any evidence of actual disruption, and without relating party affiliation to Mills' specific job responsibilities, Sheriff Meadows speculates on the possibility of future disruption at the hands of Mills. In his motion to the District Court, Sheriff Meadows sought to justify this dismissal on grounds of sheer paranoia:

> Mills was a devoted supporter of Meadows' predecessor, and Meadows had a reasonable apprehension that Mills might seek to undermine Meadows' efforts to change the way in which the office was managed. Meadows also had a reasonable basis to distrust Mills, who was one of two deputies who orchestrated the campaign for re-election of Meadows' opponent, Comes, and could reasonably be expected to do whatever was within his power to make Meadows' term in office unsuccessful so that Comes could mount a challenge to Meadows' candidacy at the next election.

J.A. 46-47. Absent any concrete evidence supporting Sheriff Meadows' paranoid predictions, such paranoia could hardly

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sheriff, threatening the job security of his subordinates and causing immediate and direct "disruption and antagonisms" within the office. *Id.* at 24. Unlike Sheriff Meadows, Sheriff Lancaster produced substantial evidence that his major's campaign activity during his own administration was wreaking havoc within his office and was impairing the efficiency of his operation. *Id.* By contrast, the record in this case is currently devoid of any activity which would, in the slightest degree, be construed as disruptive to Sheriff Meadows' office or policies. *See* J.A. 108. Here, there is absolutely no evidence that Mills ever spoke ill of Sheriff Meadows, either during or after the campaign, or ever did anything to interfere with Sheriff Meadows' job.

justify dismissing an individual for actively participating in the political process.

By failing to conduct the analysis mandated in *Pickering* and in *Connick*, the Court of Appeals has placed paranoia above the Constitution by eliminating the need for employers to prove any interest which effectively competes with fundamental First Amendment rights. Because government officials in the Fourth Circuit may now discharge subordinates without any legitimate, let alone compelling, interest to justify it, law enforcement officers within this jurisdiction may only exercise these rights at the risk of their careers.

IV. THIS COURT SHOULD ELIMINATE GROWING CONFUSION AMONG THE CIRCUITS OVER THE APPLICATION OF THE *PICKERING-CONNICK* TEST

Although this Court recently reaffirmed the need to apply the *Pickering-Connick* balancing test when analyzing terminations based upon campaign activities and speech, *O'Hare*, 116 S. Ct. at 2357-58, the Court of Appeals has joined four other Circuits who have either failed to apply this test or ignored it entirely. *See, e.g., Rodriguez Rodriguez v. Munoz Munoz*, 808 F.2d 138, 144 (1st Cir. 1986); *McEvoy v. Spencer*, 124 F.3d 92 (2d Cir. 1997); *Warzon v. Drew*, 60 F.3d 1234 (7th Cir. 1995); *Cutcliffe*, 117 F.3d 1353. These courts have eliminated the distinction between dismissals based upon party affiliation and those based upon political expression, thereby limiting the additional safeguards applicable in the latter case. In each of these courts, judges have disregarded the protections for political expression articulated in *Pickering* and *Connick* and have relegated law enforcement officers to the more narrow

test where terminations involve questions of party affiliation alone. *See Branti*, 445 U.S. 507.

In sharp contrast with courts who have refused to balance First Amendment interests with those of the employer, others have followed this Court's mandate that dismissals only be made where compelling interests justify them. *See, e.g., Voivodich v. Lopez*, 48 F.3d 879, 884 (5th Cir.), *cert. denied*, 116 S. Ct. 169 (1995); *Morris v. Crow*, 117 F.3d 449 (11th Cir. 1997). In fact, one court, the Eleventh Circuit, has actually created a schizophrenic split within its own ranks. As the Eleventh Circuit observed in one of its opinions, "It is important to retain the distinction between political patronage cases and free expression cases, because the analysis applicable to the types of cases is markedly different." *Id.*

Under circumstances even less compelling that those presented by Mills, in *Stough v. Gallagher*, 967 F.2d 1523 (11th Cir. 1992), a high ranking deputy claimed that the sheriff retaliated against him due to his "association with and political speech in support of [the sheriff's] opponent." *Id.* at 1524. Although the sheriff urged the Court to limit its analysis to the *Elrod-Branti* test governing political affiliation issues, the Eleventh Circuit refused to apply that test alone. According to that Circuit, the "action of demoting [plaintiff] for political speech and campaigning activities for the opposition is appropriately viewed under the speech category and analyzed using the *Pickering-Connick-Rankin* test." *Id.* Yet, in Mills' case, where allegations of political retribution are virtually identical,[4] the Fourth Circuit's analysis – and ultimate

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[4] In fact, Mills presented an even stronger case than Stough because the latter campaigned against an incumbent sheriff, where theories of potential disruption to an ongoing operation may be stronger. By

conclusion – is markedly different.

At bottom, in cases where deputies are allegedly discharged both on the basis of their political affiliations and on the basis of their political expression and campaign activities, the Circuits are completely confused over whether to apply the analysis of *Elrod-Branti*, *Pickering-Connick*, or both. With differing levels of First Amendment analysis, law enforcement officers have not been able to enforce their own rights to the same extent in all states. Because officers everywhere should enjoy the same First Amendment rights, this Court should step in to guide the Circuits toward a uniform application of its earlier principles.

CONCLUSION

Although this Court has long protected the First Amendment rights of law enforcement officers, many sheriffs, police chiefs and Courts of Appeal have not. As the lower courts continue to struggle with differing methods of analysis in cases of dismissals based upon political affiliation, expression and campaign activity, the divergent conclusions which they have reached leave law enforcement officers subject to varying levels of First Amendment protection in different states. Because all of these officers are vested with the same duty to protect the public in all states, their own constitutional protection should not vary from state to state. For this reason, Petitioner Marlin Lee Mills respectfully requests that this Court

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contrast, Mills supported an incumbent and, following the election, never voiced any opposition to the newly-elected sheriff. *See* J.A. 108.

grant the petition for writ of certiorari.

Respectfully submitted,

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Attorney for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Marlin Lee Mills	*	
Appellant	*	
v.	*	No. 98-1704
Joseph P. Meadows, *et al.*	*	
Appellees	*	

* * * * * * * * * * * * * * *

Appeal from the United States District Court

Argued: June 10, 1999 .
Decided: July 22, 1999

Before MURNAGHAN, WILKINS and HAMILTON, Circuit Judges.

Affirmed by unpublished per curiam opinion.

OPINION

PER CURIAM:

Marlin Lee Mills appeals an order of the district court granting summary judgment to Joseph P. Meadows, Sheriff of

Harford County, Maryland,[1] on Mills' claims that Meadows terminated him in violation of his constitutional rights to free speech and due process. Because we conclude that Meadows was entitled to terminate Mills on the basis of the latter's political affiliation and that Mills was not entitled to a pretermination hearing, we affirm.

I.

The facts, viewed in the light most favorable to Mills, are as follows. Mills began employment with the Harford County Sheriff's Office in 1971 as an entry-level deputy. Over the course of the next 20 years, he received several promotions. In January 1994, then-Sheriff Robert Comes promoted Mills to the position of captain. As a captain, Mills was equaled or exceeded in rank by only ten officers, including the sheriff, in a 230-person office.

In 1994, Sheriff Comes, a Democrat, ran for reelection against Meadows, a Republican. At the time of the campaign, Mills was the president of the Harford County Democratic Club. Additionally, he actively supported Comes' candidacy by hosting a fundraiser at his private swim and golf club and by posting a large campaign sign at the entrance to the club. These efforts were unavailing, however, and Meadows was elected Sheriff in November, 1994.

Shortly after his election, Meadows met individually with each member of the upper-level command staff. During

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[1] Mills also named Harford County as a defendant in this action. Because the County's liability, if any, is derived solely from Meadows' actions in his official capacity, we will refer to Appellees collectively as "Meadows" throughout this opinion.

his meeting with Mills on December 6, 1994, Meadows asked about Mills' relationship with Comes and indicated that he understood Mills to have been Comes' "right hand man." J.A. 105. Mills disputed this characterization of his position in the office and asserted that he was willing to serve Meadows as sheriff. Meadows stated that he did not know where Mills would fit into his organization, if anywhere, and that he would make a decision in the near future. Thereafter, Meadows conducted an informal investigation during which he was informed that no member of the upper-level command staff wanted to work with Mills and that many lower-level deputies had "expressed concerns about Mills' police and command acumen." J.A. 63. Approximately two weeks after their initial meeting, Meadows again met with Mills and informed him that he would be terminated if he did not resign. Later that day, Mills took early retirement effective January 1, 1995.[2]

Mills subsequently filed this action pursuant to 42 U.S.C.A. § 1983 (West Supp. 1999), alleging that Meadows terminated him based upon his political affiliation and campaign activities in violation of the First Amendment. Mills further claimed that Meadows violated the Fourteenth Amendment guarantee of procedural due process by firing him without providing a pretermination hearing. Additionally, Mills raised a claim of conspiracy under 42 U.S.C.A. § 1985 (West 1994), asserted that his termination violated substantive

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[2] The employment action to which Mills was subjected has been characterized variously in the record as a termination, a failure to rehire, and a forced retirement. The nomenclature employed makes no difference for purposes of our analysis; the salient point is that Mills left his employment involuntarily. *See Branti v. Finkel*, 445 U.S. 507, 512 n.6 (1980). Throughout this opinion, we will refer to Mills as having been terminated.

due process, and stated several state-law claims. Prior to discovery, the district court granted summary judgment to Meadows on the federal claims, *see* Fed. R. Civ. P. 56, and declined to exercise jurisdiction over the state-law claims, *see* U.S.C.A. § 1367(c)(3) (West 1993). On appeal, Mills challenges the grant of summary judgment on his First Amendment and procedural due process claims. We review the decision of the district court de novo. *See Higgins v. E.I. DuPont de Nemours & Co.*, 863 F.2d 1162, 1167 (4th Cir. 1988).

II.

Our analysis of Mills' First Amendment claim is controlled by our en banc decision in *Jenkins v. Medford*, 119 F.3d 1156 (4th Cir. 1997) (en banc), *cert. denied*, 118 S. Ct. 881 (1998). In *Jenkins*, we considered the claims of several deputy sheriffs who were fired by the newly elected sheriff of Buncombe County, North Carolina. The deputies, all of whom had supported the sheriff's political opponents during the campaign, alleged that they had been terminated in violation of their First Amendment rights. *See id.* at 1158-59. We held that the deputies' claims should be analyzed under the line of Supreme Court precedent established by *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, U.S. 507 (1980). *See Jenkins*, 119 F.3d at 1160-61. Under *Elrod* and *Branti*, an employee may not be terminated solely on the basis of political affiliation, *i.e.*, merely because he belongs to a different political party or faction than his employer, unless the employer "can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti*, 445 U.S. at 518; *see Elrod*, 427 U.S. at 355-60, 367 (plurality opinion); *id.* at 375 (Stewart, J., concurring in the judgment).

In determining whether a sheriff in North Carolina could terminate deputy sheriffs based on political affiliation, we considered "the specific political and social roles of sheriffs and their deputies in North Carolina" and noted that sheriffs in that state are "important political figure[s]" who are responsible for implementing a political agenda that has been approved by the voters through the sheriff's election. *Jenkins*, 119 F.3d at 1163. Moreover, we observed that in North Carolina, a deputy sheriff is the alter ego of the sheriff, who can be held liable for a deputy's misconduct. Based upon these considerations, we held that party affiliation was an appropriate requirement for the office of deputy sheriff in North Carolina; therefore, the sheriff did not violate the First Amendment rights of the deputies in terminating them. *See id.* at 1164.[3]

Jenkins is dispositive of Mills' claims that his dismissal violated his constitutional rights. In Maryland, as in North Carolina, a deputy sheriff is the alter ego of the sheriff. *See Rucker v. Harford County, Md.*, 558 A.2d 399, 402, 406 (Md. 1989). Additionally, Mills was a high-ranking official — in a department of 230 people, he was one of only seven captains and was exceeded in rank by only four officers, including the sheriff himself. Furthermore, at the time of his discharge Mills was an at-will employee. Because Mills' position is essentially indistinguishable from the position occupied by the deputy sheriffs whose claims we considered in *Jenkins*, that case compels a conclusion that Meadows was entitled to terminate Mills on the basis of his political affiliation. Accordingly, we affirm the grant of summary judgment to Meadows on this claim.

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[3] We limited our holding, however, "to those deputies actually sworn to engage in law enforcement activities on behalf of the sheriff." *Id.* at 1165.

III.

Mills next contends that the district court erred in rejecting his claim that he was deprived of procedural due process when Meadows terminated him without first providing a hearing. Mills bases this claim on a provision of the Maryland Law Enforcement Officers' Bill of Rights (LEOBR) which states that a law enforcement officer is entitled to a hearing if "investigation or interrogation of [the] law enforcement officer results in the recommendation of ... dismissal." Md. Ann. Code art. 27, § 730(a) (Supp. 1998).

We affirm the grant of summary judgment to Meadows on this issue because Mills was not entitled to a pretermination hearing under the LEOBR. The procedural protections of the LEOBR apply "only when [an] officer is investigated and/or interrogated as a result of a disciplinary-type complaint lodged against the officer." *Calhoun v. Commissioner, Baltimore City Police Dep't*, 654 A.2d 905, 911 (Md. Ct. Spec App. 1995). Here no, complaint was ever lodged against Mills.

IV.

For the reasons et forth above, we conclude that the district court correctly granted summary judgment to Meadows on Mills' First Amendment and procedural due process claims.[4] Accordingly, we affirm.

AFFIRMED

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[4] In view of our disposition of the merits of the appeal, we need not consider Harford County's claim that it is not a proper party to this action.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Marlin Lee Mills	*	
Plaintiff	*	
		Civil Action No.:
v.	*	JFM-97-3329
Joseph P. Meadows, *et al.*	*	
Defendants	*	

* * * * * * * * * * * * * * *

OPINION

Marlin Lee Mills has brought this action against Sheriff Joseph P. Meadows and Harford County, Maryland ("Harford County"). Mills claims that his employment as a deputy sheriff was terminated in violation of the First and Fourteenth Amendments to the United States Constitution and parallel provisions of the Maryland Constitution. He also asserts several common law tort claims. Meadows has moved to dismiss the complaint, or, in the alternative, for summary judgment. Harford County has also filed a motion to dismiss.[1] For the reasons that follow, I will grant summary judgment in favor of defendants as to Mills' federal claims and dismiss his state law claims pursuant to 28 U.S.C. § 1367(c)(3).

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[1] Because I am considering matters outside the pleadings in resolving the issues presented, I will treat Harford County's motion as one for summary judgment in accordance with Federal Rule of Civil Procedure 12(b).

I.

Mills joined the Harford County Sheriff's Office in 1971 as an entry level deputy sheriff. Over the years, Mills was promoted to the rank of deputy first class, corporal, sergeant, lieutenant, and finally captain. Mills received his last two promotions during the administration of Sheriff Robert Comes, who was elected in 1990.

In the 1994 general election Comes, a Democrat, was opposed by Meadows, the Republican candidate. Mills, as president of the Harford County Democratic Club, actively supported the Comes campaign, hosting a fundraising event on Comes' behalf at the private swim and golf club he owns and displaying Comes' campaign sign at the club. Meadows defeated Comes in the November 1994 general election and was sworn into office as Sheriff of Harford County on December 5, 1994.

Meadows has submitted an affidavit describing the background of the 1994 election as follows:[2]

> From his election in 1962 until his retirement in 1981, William J. Kunkel ("Kunkel") has been the Sheriff of Harford County, and the office enjoyed stability.

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[2] Mills has submitted his own affidavit denying he had any involvement in alleged mismanagement of the detention center or the Sheriff's Office as a whole. However, he has not disputed Meadows' general description of what lead to Meadows' election. In any event, factual disputes as to how well the Sheriff's Office was being managed are to be decided by the electorate, not by the courts. What is pertinent here is that Meadows could property interpret the outcome of the election as a mandate for change, imposing upon him the responsibility to put in place a management team that could effect that change.

Following Sheriff Kunkel's retirement, there were two one-term Sheriffs: Theodore Moyer ("Moyer") (who was appointed Sheriff upon Kunkel's retirement and elected in the 1982 general election) and Dominick Mele ("Mele") (who defeated Moyer in the 1986 Democratic primary and won the general election unopposed). Robert Comes ("Comes") ran unopposed (after Mele lost the democratic [sic] primary, he was a write-in candidate, but received very few votes, not being on the ballot) and was elected Sheriff in the1990 general election, having defeated Mele in the 1990 Democratic primary.

Prior to the 1994 general election, morale among the deputies was at an all time low since I had been working as an Assistant State's Attorney. Deputies were constantly complaining to me that they believed that Comes and his upper level command staff were incompetent and that the office was being mismanaged. The Sheriff's Office received considerable negative press coverage as the result of an incident at the detention center, and many deputies were unhappy about the negative public image resulting from the incident and the way the Sheriff handled the incident. A number of deputies and groups of deputies approached me about running for Sheriff in the 1994 elections. I was not approached by representatives of the Republican party to run for Sheriff as the Republican candidate. My candidacy received support within the Sheriff's Office from both Democratic and Republican deputies. Party affiliation had no significant role with respect to support of my candidacy.

When Meadows took office there were approximately 230 deputies working under his command. Of this group, the only people of equal or higher rank than Mills were Meadows himself, his chief deputy, one major, one warden, and six other captains. On December 6 and 7, 1994, Meadows met with most of the members of his upper level command staff, and with most of his lieutenants and sergeants. Meadows met with Mills on December 6, 1994. On December 19, 1994, Meadows informed Mills that he had decided not to reappoint him as a deputy in his administration.

Mills alleges that he was removed from the Harford County police force because of his political association with and campaign activity on behalf of Comes. He maintains that he had served effectively under five separate administrations and that he emphasized to Meadows that he would "serve with similar diligence and distinction under [his] administration."

Meadows counters that party affiliation was not a factor when he filled his upper level command positions. Rather, he asserts that he made those appointments based on who he perceived could implement his policies and directives. He states, without contradiction, that of Sheriff Comes' upper level command staff, four were retained, two or three retired, and two or three (including Mills) were dismissed.[3] Both the group whom Meadows retained and those whom he newly appointed included members of the Democratic party. As to Mills himself, Meadows asserts that several factors led to his decision not to reappoint him, including Mills' loyalty to Comes, what Meadows perceived as Mills' failure to express

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[3] The uncertainness of the retirement/dismissal figures depends upon how Colonel Thomas Broumel, who had been Comes' second-in-command, is classified.

loyalty to him, what Meadows perceived as Mills' mismanagement of the detention center and the Sheriff's Office budget, and a reluctance to work with Mills expressed by many of the rest of the upper level management team assembled by Meadows.

Mills' complaint contains eleven counts. Counts One through Four assert claims pursuant to 42 U.S.C. § 1983, alleging violations of various First Amendment and Fourteenth Amendment rights. Count Five states a claim for conspiracy under 42 U.S. C. § 1985. Counts Six, Seven, Eight and Eleven assert pendent state common law claims for wrongful discharge, negligent misrepresentation, intentional misrepresentation and intentional infliction of emotional distress, respectively. Count Nine seeks injunctive relief and Count Ten alleges violations of the Maryland Constitution.

II.

Discovery has not yet been conducted, and the first question I must decide is whether summary judgment is appropriate at this state of the proceedings. In my judgment it is appropriate. Whatever factual disputes exist are not material to the ultimate resolution of the issues. The record as it presently exists establishes that Mills held a position with the Sheriff's Office that was sufficiently high and powerful that it was reasonable and constitutionally proper for Meadows to replace him with an officer of his own choosing. In reaching this conclusion I am mindful of the concern expressed by the Fourth Circuit that litigation of this kind has the potential of "diverting sheriffs' attention from the important public safety issues in their communities." *Jenkins v. Medford*, 119 F.3d 1156, 1164 (4th Cir. 1997)(en banc).

III.

42 U.S.C. § 1983, upon which Counts One through Four are based, requires a plaintiff to establish a deprivation of a right secured by the Constitution or a federal statute. Mills asserts that his rights to free association and free speech, secured by the First and Fourteenth Amendments, have been violated.

A.

In *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980), the Supreme Court declared that as a general proposition it is unconstitutional for government employees to be dismissed because of their political affiliation. Both cases were decided against the background of the traditional practice in many political subdivisions of staffing public offices with patronage appointments. In *Elrod* the Court carved out an exception for employees holding "policymaking" positions. *See Elrod*, 427 U.S. at 367. In *Branti*, while holding that assistant public defenders were not subject to patronage dismissals, the Court modified the *Elrod* exception, stating that "the ultimate inquiry is not whether the label 'policymaker'... fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti*, 445 U.S. at 518.

The Fourth Circuit has applied the *Elrod-Branti* exception and held that "newly elected or re-elected sheriffs may dismiss deputies ... because of party affiliation." *Jenkins*, 119 F.3d at 1164. *See also Upton v. Thompson*, 930 F.2d 1209, 1218 (7th Cir. 1991) (recognizing right of sheriff to rely upon political considerations when determining who will serve as

deputies); *Terry v. Cook*, 866 F.2d 373, 377 (11th Cir. 1989) (recognizing sheriff's absolute authority to decline to reinstate deputies who did not support him in election). The court reasoned that political affiliation "serves as a proxy for loyalty to the sheriff," and that loyalty is an appropriate job requirement that a sheriff may consider when filling positions resembling "a policymaker, a communicator, or a privy to confidential information." *Jenkins*, 119 F.3d at 1164 (internal citations omitted). The court reached its conclusion after conducting a detailed inquiry into the specific roles of the sheriff and deputies at issue in the case. *See id.* at 1163-64.

It is clear from the facts of this case that Mills' position within the Sheriff's Office was that of "a policymaker, a communicator, or a privy to confidential information," *see id.* at 1164 (internal citations omitted), and that his loyalty was a requirement appropriately considered by Meadows. As a captain, Mills was a highly placed official in the Comes administration. Though he denies being a part of Comes' upper level command staff, the record is clear that only a handful of individuals within the 230-member agency had attained an equal or higher rank. As a result he necessarily served as a link between the sheriff and the deputies in the agency, and played a significant role in the implementation of the sheriff's policies. Thus, Meadows could lawfully terminate Mills for political reasons under the *Elrod-Branti* exception to prohibited political terminations.

B.

Mills asserts a related First Amendment claim that must be separately considered. A government may not take adverse action against an employee for exercising his First Amendment rights. *See, e.g., Connick v. Myers*, 461 U.S. 563 (1968). Here,

Mills alleges that Meadows terminated his employment not only because of his political affiliation but also because had actively campaigned for Mills' opponent. In such a case it appears that a court should engage in an analysis under *Pickering* and *Connick* as well as under *Elrod* and *Branti*. *See O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712, —, 116 S. Ct. 2353, 2357-58 (1996).

Pickering and *Connick* establish a two-step test to determine whether the speech of a public employee is constitutionally protected. First, the court must inquire whether the employee spoke on a matter of public concern. *See Connick*, 461 U.S. at 146-48. If so, the court must then balance "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568. The entire balancing process is an inquiry of law for the court. *See Joyner v. Lancaster*, 815 F.2d 20, 23 (4th Cir. 1987).

In *Jenkins*, 119 F.3d at 1164, the Fourth Circuit did not apply the *Pickering-Connick* test in determining that the defendant had properly discharged the deputy sheriff plaintiffs. However, in *Joyner*, 815 F.2d at 20, the court did apply *Pickering-Connick* to uphold the dismissal of a deputy sheriff whose employment was terminated because he campaigned on behalf of the incumbent sheriff's opponent. In that case, the deputy dismissed was one of four captains in a department of some 150 deputies, and he had only two superiors. *See id.* at 21. Noting the importance of the deputy's role in the operations of the department and implementation of the sheriff's policies, the court concluded that "mutual confidence and loyalty [between a sheriff and deputies] are of great importance," and approved the dismissal. *Id.* at 24.

There is no question that in this case Mills engaged in speech involving a matter of public concern. I find, however, that the interests of the public and Meadows in the effective and efficient fulfillment of the responsibilities of the Sheriff's Office outweighed Mills' interest in exercising his First Amendment rights. Like the plaintiff in *Joyner*, Mills was a high-ranking official in his department. He had very few superiors. Whatever his actual duties, by virtue of his rank Mills necessarily played a visible role in the administration, one with the concomitant ability to facilitate (or impede) the effective implementation of the sheriff's policies. Understandably, Meadows desired to full such a role with an individual he perceived to be both loyal and likely to command the respect of the deputies in the office who were his subordinates. He deemed Mills not to be such an individual, and thus declined to reappoint him as a deputy in his administration. That decision was not an unreasonable one. *See O'Hare Truck Service, Inc.*, 116 S. Ct. at 2358.

IV.

A.

In Count Five, which states a claim for conspiracy under 42 U.S.C. § 1985, Mills alleges that Meadows and other Harford County officials conspired to violate his constitutional rights. This claim also fails. Mills' allegations are made under § 1985(3). To state a cause of action under that section, plaintiff must allege "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *United Brotherhood of Carpenters and Joiners of America v. Scott*, 463 U.S. 825, 829 (1983) (internal citations omitted). The record in this case is devoid of any allegation of such conduct, which is necessary to trigger the

proscription of § 1985(3).

B.

In light of my rulings to dismiss all of Mills' federal claims, I will decline to exercise supplemental jurisdiction over Mills' state law claims and will dismiss them. *See* 28 U.S.C. § 1367(c)(3).

A separate order effecting the rulings made in this Opinion is being entered herewith.

Date: April 16, 1998

J. Frederick Motz
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Marlin Lee Mills	*	
Plaintiff	*	
		Civil Action No.:
v.	*	JFM-97-3329
Joseph P. Meadows, *et al.*	*	
Defendants	*	

* * * * * * * * * * * * * * *

ORDER

For the reasons stated in the Memorandum entered herewith, it is this 16th day of April, 1998.

ORDERED

1. The motion to dismiss or for summary judgment filed by defendant Joseph P. Meadows is treated as one for summary judgment as to Counts One through Five and is granted as such;

2. The motion to dismiss or for summary judgment filed by defendant Meadows is treated as a motion to dismiss as to Counts Six through Eleven and is granted as such;

3. The motion to dismiss filed by defendant Harford County, Maryland, is treated as a motion for summary judgment as to Counts One through Five and is granted as such;

4. The motion to dismiss filed by defendant Harford County, Maryland, is granted as to Counts Six through Eleven;

5. Judgment is entered in favor of defendants against Plaintiff as to Counts One through Five; and

6. Counts Six through Eleven are dismissed pursuant to 28 U.S.C. § 1367(c)(3).

J. Frederick Motz
United States District Judge

MOTION FILED

NOV 10 1999

No. 99-703 (2)

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1999

MARLIN LEE MILLS, Captain

Petitioner,

v.

JOSEPH P. MEADOWS,
individually and in his official capacity
as Sheriff for Harford County;
and
HARFORD COUNTY, MARYLAND,
a Body Politic and Political Subdivision
of the State of Maryland

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS, IN SUPPORT OF THE PETITIONER FOR A WRIT OF CERTIORARI

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31 pp

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS, IN SUPPORT OF THE PETITIONER FOR A WRIT OF CERTIORARI

The National Association of Police Organizations ("NAPO" or "Association") hereby respectfully moves this Court for leave to file a brief as an *amicus curiae*, pursuant to Rule 37.1 and 2.

Pursuant to Supreme Court Rule 37.2, on October 27, 1999, NAPO requested consent of Philip S. Roberts, Assistant County Attorney, counsel for Respondent Harford County, Maryland, and of Stuart M. Nathan, Assistant Attorney General, State of Maryland, counsel for Respondent Sheriff Meadows, to file an *amicus curiae* brief in support of the petitioner for a writ of certiorari. On November 1, 1999, Mr. Roberts advised NAPO that he was unwilling to consent to the filing of an *amicus* brief. Mr. Nathan advised NAPO's general counsel that he would take his lead from Mr. Roberts as to whether to grant consent, because Mr. Roberts has served as lead counsel for the Respondents in this matter, and therefore Mr. Nathan has withheld his consent on behalf of Sheriff Meadows.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae National Association of Police Organizations, Inc. ("NAPO") is a national non-profit organization, representing state and local law enforcement officers in the United States.[1] Specifically, NAPO is a coalition of police associations and unions that serves to advance the interests and legal rights of law enforcement officers through advocacy, education, and legislation. NAPO represents 4,000 law enforcement organizations, with over 250,000 sworn law enforcement officers

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[1]NAPO's section 501(c)(3) affiliate, the National Law Enforcement Officers' Rights Center of the Police Research and Education Project, advocates the due process and workplace rights of officers.

(including police officers, deputy sheriffs, state troopers, highway patrol officers, and traffic enforcement personnel) and 11,000 retired officers.

Those officers and their organizations have a significant interest in the important issues of law before this Court, as some of their most basic constitutional rights, specifically those granted under the First Amendment, are at stake. Hence, it is imperative that those rights be protected, not violated, as they were in this case and in other cases throughout the Nation.

Unfortunately, there are several courts of appeal that have ruled that all deputy sheriffs, including Petitioner Mills, are subject to political patronage requirements, holdings which are inconsistent with this Court's decisions in *Elrod* and *Branti*.[2] Further, it is well established that when a government employer terminates an employee due to the employee's exercise of his or her First Amendment right of free speech, rather than simply based on raw political patronage alone, the reviewing court must follow the two step process set forth in this Court's *Pickering* and *Connick* decisions,[3] in determining whether the public employee's speech is constitutionally protected. Nevertheless, the U.S Court of Appeals for the Fourth Circuit has refused to follow this Court's directives in such cases, opting instead to follow the lead of the first, second, seventh, and eleventh circuit courts. Consequently, there are inconsistent holdings among, as well as within, the circuits, which undermine the principle of equal justice under law.

NAPO has member organizations with sworn law enforcement officers in the states covering four of the five

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[2]*Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673 (1976) and *Branti v. Finkel*, 445 U.S. 507, 100 S.Ct. 1287 (1980).

[3]*Pickering v. Board of Education of Township High School Dist. 205*, 391 U.S. 563, 88 S.Ct. 1731 (1968) and *Connick v. Myers*, 461 U.S. 138, 103 S. Ct. 1684 (1983).

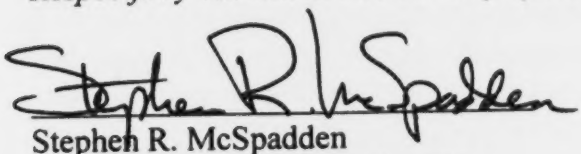
federal judicial circuits. In this day and age it is intolerable that the First Amendment rights of law enforcement officers in these states have been so severely diminished that officers can actually be fired for participating in political campaigns, or expressing their support for particular political candidates running for public office. Consequently, a deputy sheriff discriminated against on the basis of race or gender in one of the large number of states covered by these circuits would have a cause of action under the federal civil rights laws, but one disciplined for political activity would have no such remedy. Fortunately, this is not the case in all states, as these activities are plainly protected in most of the remaining federal circuits.

When NAPO has explained this lack of protection to its member organizations during legal seminars and otherwise, such explanations have met with disbelief. In response, NAPO's members have urged NAPO to support whatever opportunity arose to present this issue to this Honorable Court. *Amicus curiae* observes that the participation and contribution of organizations, such as NAPO, lies at the very heart of the First Amendment, permitting concerned citizens and their organizations to express their views and take positions on matters of public interest and the conduct of government officials, including conduct allegedly impinging on the constitutional protections of free speech and political activity. Thus, in the context of this motion, this Court should permit NAPO to express the views of thousands of law enforcement officers whose First Amendment rights have been disregarded by U.S. Courts of Appeal in those several circuits that have departed from this Court's constitutional mandates.

Therefore, *amicus curiae* National Association of Police Organizations has a significant interest in this petition and it requests that the Court grant leave for it to file the brief in support of Mr. Mills' petition for a writ of certiorari, in order to consider essential points which would support this Court's review of the lower court's appellate decision in this case. As required by Rule 37.2(b), this motion is incorporated in one

document together with the proposed brief, which immediately follows this motion.

Respectfully submitted this 10th day of November, 1999,



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II. Petitioner Mills' assertion that he was terminated due to his involvement in a competing candidate's re-election campaign, an activity involving overt speech and expression of ideas, gives rise to a First Amendment free speech claim, the appropriate analysis of which is based on the Pickering-Connick line of cases. Consequently, the appellate court's failure to evaluate Petitioner Mills' claim under the appropriate standards set forth in Pickering and Connick resulted in the complete disregard of his First Amendment rights. 7

A. The district and appellate courts should have analyzed Petitioner Mills' claim under the Pickering-Connick line of cases. 8

B. Had the Court of Appeals applied the proper analysis in considering Petitioner Mills' claim and remanded this case to the District Court, that court would have had no choice but to find that Sheriff Meadows' termination of Mills was an undeniable violation of Mills' First Amendment rights, if the alleged facts of Petitioner's claim were proven. . . 9

III. Even if the issue in this case were one of political patronage and not free speech, thus requiring evaluation under the Elrod and Branti line of cases, the inexplicable and arbitrary decisions by some courts of appeal (including the Fourth Circuit), holding that all deputy sheriffs, including Petitioner Mills, are subject to political patronage requirements, are inconsistent with this Court's decisions in Elrod and Branti, and have created tremendous confusion among the circuits. 11

A. Dismissals for reasons of political patronage violate the First and Fourteenth Amendments, unless the employing government official can show that the restriction is narrowly tailored to accomplish government interests. . . 11

B. Under Elrod and Branti, the position of deputy sheriff does not summarily qualify and should not therefore be automatically designated as an office for which party affiliation is an appropriate requirement for the effective performance of the officer's duties. Hence, the courts must analyze each case individually in order to determine whether political patronage is a valid requirement for the office in question. 13

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae National Association of Police Organizations, Inc. ("NAPO") respectfully submits this brief in support of the petitioner for a writ of certiorari in this case.[4]

NAPO is a national non-profit organization, representing state and local law enforcement officers in the United States.[5] Specifically, NAPO is a coalition of police associations and unions that serves to advance the interests and legal rights of law enforcement officers through advocacy, education, and legislation. NAPO represents 4,000 law enforcement organizations, with over 250,000 sworn law enforcement officers (including police officers, deputy sheriffs, state troopers, highway patrol officers, and traffic enforcement personnel) and 11,000 retired officers.

Those officers and their organizations have a significant interest in the important issue now before this Court, specifically clarification of the law concerning their fundamental rights granted under the First Amendment. Hence, it is imperative that those rights be protected, not violated, as they were in this case and in other cases throughout the Nation. The *amicus curiae* asks that this Court grant review in order to provide the lower courts with clear directives on how to resolve the issues presented, so that deputy sheriffs and other public employees can engage in activities protected by those rights without constant

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[4]Pursuant to Supreme Court Rule 37.6, no counsel for any party in this case authored this *amicus curiae* brief in whole or in part, and no person or entity, other than the *amici curiae* and its members, made a monetary contribution to the preparation or submission of the brief.

[5]NAPO's section 501(c)(3) affiliate, the National Law Enforcement Officers' Rights Center of the Police Research and Education Project, advocates the due process and workplace rights of officers.

fear of reprisals, and can expect consistent rulings pertaining to those rights among and within the circuit courts of appeal.

In summary, NAPO respectfully requests that certiorari be granted in the instant case so that the First Amendment rights of public employees, and specifically deputy sheriffs, will be guaranteed equal protection under the law.

STATEMENT OF THE CASE

The *amicus curiae* adopts the factual statement in Petitioner Marlin Lee Mills' petition for writ of certiorari. What follows is a shorter narrative of the facts and proceedings.

After 23 years of dedicated service with the Harford County, Maryland, Sheriff's Office under five separate sheriffs, Petitioner Marlin Lee Mills ("Mills") was terminated, on December 19, 1994, without a hearing, by newly-elected Republican Sheriff Joseph P. Meadows. Sheriff Meadows' stated basis for this termination was Mills' political association with Sheriff Meadows predecessor, Democrat Robert Comes, as well as Mills' activities as president of the Harford County Democratic Club.

Deprived of his law enforcement career, Mills sued Sheriff Meadows and Harford County, Maryland, to redress eleven specific offenses, including violation of his First Amendment rights. In response to these claims, Harford County moved to dismiss the case and Sheriff Meadows filed a Motion for Dismissal/Summary Judgment. The U.S. District Court for Maryland entered summary judgment for both defendants on April 16, 1998.

On May 14, 1998, Petitioner appealed to the U.S. Court of Appeals for the Fourth Circuit. On July 22, 1999, the appellate court entered judgment, affirming the District Court's decision. The court held that Sheriff Meadows was entitled to terminate

Mills on the basis of Mills' political affiliation, because party affiliation is an appropriate requirement for the office of deputy sheriff in Maryland. The appellate court also cited the fact that Mills was a "high-ranking official" and an "at-will" employee in justifying its holding. *Mills v. Meadows*, 1999 U.S. App. LEXIS 16895.

Mills now respectfully petitions the Supreme Court of the United States for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

Despite this Court's directives as set forth in the *Elrod-Branti*[6] and *Pickering-Connick*[7] lines of cases, tremendous confusion still exists among and within the U.S. judicial circuits concerning the First Amendment rights of public employees, especially deputy sheriffs. This point is emphasized by the commentary of legal expert J. Michael McGuinness:[8]

> In the law enforcement context, the courts have consistently prohibited various forms of political patronage. Among the most confusing areas involves deputy sheriffs. The law is in chaotic confusion with regard to the reemployment rights of deputy sheriffs upon election of a new sheriff. The law is also in mass confusion regarding the extent that a deputy can

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[6] *Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673 (1976) and *Branti v Finkel*, 445 U.S. 507, 100 S.Ct. 1287 (1980).

[7] *Pickering v. Board of Education of Township High School Dist. 205*, 391 U.S. 563, 88 S.Ct. 1731 (1968) and *Connick v. Myers*, 461 U.S. 138, 103 S. Ct. 1684 (1983).

[8] J. Michael McGuinness is a member of the North Carolina, Massachusetts, District of Columbia, and the U.S. Supreme Court Bars, as well as other federal and specialized courts. Mr. McGuinness has served as a professor of law at Massachusetts School of Law, and as a lecturer.

support an opponent in a sheriff's election campaign.[9]

The lower courts are split on two major issues: first, how to properly analyze free speech claims, with some courts using the *Pickering-Connick* analysis[10] while others apply the *Elrod-Branti* analysis[11]; and second, under *Branti,* how to determine whether "party affiliation is an appropriate requirement for the effective performance of the public office involved." 445 U.S. at 518, 100 S.Ct. at 1295.

Consequently, the rights of public employees, and in particular, deputy sheriffs, differ greatly throughout the nation, depending upon the jurisdiction in which the claimants file suit. Moreover, this ambiguity in the lower courts' interpretation of the law results in the assertion of a greater number of claims than necessary, and undermines the credibility of the federal judiciary's commitment to equal justice under the law.

Accordingly, *amicus curiae* respectfully requests that this Court resolve the following issues, thus mending a division

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[9]J. Michael McGuinness, Constitutional Rights of Law Enforcement Officers in the Employment Context 72 (1996) (unpublished manuscript on file with NAPO) (presented and distributed at the 1996 National Association of Police Organizations 18th Annual Convention).

[10]The *Pickering-Connick* analysis uses a two step process in determining whether or not a public employee's speech is constitutionally protected. The first inquiry is whether the employee spoke on a matter of "public concern." *Connick*, 461 U.S. at 147-48, 103 S.Ct. at 1690-91. If so, then the court is required to balance "the interests of the [employee], as a citizen in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568, 88 S.Ct. at 1734-35.

[11]The *Elrod-Branti* analysis asks "whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti*, 445 U.S. at 518, 100 S.Ct. at 1295.

among the circuits and ensuring a consistent interpretation and application of the law throughout the nation: First, when a government employer terminates an employee due to the employee's overt speech and campaigning activities, as well as the employee's political patronage, should the reviewing court apply the two step process set forth in the *Pickering-Connick* line of cases in determining whether the public employee's speech is constitutionally protected? Second, if a deputy sheriff is terminated solely because of his political patronage, thus requiring evaluation under *Elrod* and *Branti*, may a court automatically determine that party affiliation is an appropriate requirement for the effective performance *all* deputy sheriffs, without further analysis of the facts of the case? Third, considering this Court's holdings in cases such as *Perry* and *Keyishian,* can a government employer dismiss an "at-will" employee for reasons that infringe upon the employee's constitutionally protected interests?

I. It is well established that when a government employer terminates an employee due to the employee's exercise of his or her First Amendment right of free speech, rather than simply based on raw political patronage alone, the reviewing court must follow the two step process set forth in the *Pickering* and *Connick* line of cases, in determining whether the public employee's speech is constitutionally protected. Nevertheless, the U.S Court of Appeals for the Fourth Circuit has refused to follow this Court's directives in such cases, opting instead to follow the lead of four other circuit courts. Consequently, the errant application of the law by these courts has resulted in inconsistent holdings among, as well as within, the circuits, and undermined the principle of equal justice under law.

Only a few years ago, this Court stated, in *O'Hare Truck Service, Incorporated, v. City of Northlake*, 518 U.S. 712, 719, 116 S.Ct. 2353, 2357 (1996), that when a plaintiff alleges that "a government employer takes adverse action on account of an employee or service provider's right of free speech", the court

must apply, not the analysis set forth under the *Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673 (1976) and *Branti v Finkel*, 445 U.S. 507, 100 S.Ct. 1287 (1980) line of cases, but rather, must apply the balancing test set forth in *Pickering v. Board of Education of Township High School Dist. 205*, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734-35 (1968) and *Connick v. Myers*, 461 U.S. 138, 140, 103 S. Ct. 1684, 1686 (1983). The *Elrod-Branti* line of cases asks "whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti*, 445 U.S. at 1218, 100 S.Ct. at 1295. *Pickering and Connick*, on the other hand, take a totally different approach, asking instead whether the employee spoke on a matter of "public concern", and if so, the court is required to strike a balance between "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Jenkins v. Medford*, 119 F.3d 1156 (1997), cert. denied, 522 U.S. 1090, 118 S.Ct. 881 (1998) (citing *Pickering*, 391 U.S. at 568, 88 S.Ct. At 1734-35).

Examples in which the courts of appeal have correctly applied the *Pickering-Connick* balancing test in analyzing cases with facts that are very similar to those in this case include: *Burns v. County of Cambria, Pa*, 971 F.2d 1015 (3d Cir. 1992); *McBee v. Jim Hogg County, Tex.*, 730 F.2d 1009 (5th Cir. 1984) (en banc); *Stough v. Gallagher*, 967 F.2d 1523 (11th Cir. 1992); and *Rogers v. Miller*, 57 F.3d 986 (11th Cir. 1995). In fact, the Fourth Circuit itself, contrary to its new interpretation of the law, also drew upon the *Pickering-Connick* balancing test under similar circumstances in *Joyner v. Lancaster*, 815 F.2d 20 (4th Cir. 1987), and *Jones v. Dodson*, 727 F.2d 1329, 1334 & n.6 (4th Cir. 1984) where the court explicitly stated:

> Where the protected activity involves overt 'expression of ideas' [rather than raw patronage discharges], the more open-ended inquiry prescribed by *Pickering* and its progeny are

> required to accomplish the necessary balancing. This is so even where the arguably protected activity involves 'political' speech or expression, particularly when the 'political' speech impinges directly upon employee-employer relationships.

The Fourth Circuit now chooses to blur the lines between political patronage and free speech, and in doing so joins four other circuits in its errant reliance on the reasoning set forth in *Elrod* and *Branti* when analyzing both types of claims. *See, e.g., Rodriguez Rodriguez v. Munoz Munoz,* 808 F.2d 138 (1st Cir. 1986); *McEvoy v. Spencer*, 124 F.3d 92 (2d Cir. 1997); *Heideman v. Wirsing*, 7 F.3d 659 (7th Cir. 1993); *Warzon v. Drew*, 60 F.3d 1234 (7th Cir. 1995); *Upton v. Thompson*, 930 F.2d 1209 (7th Cir. 1991); and *Cutcliffe v. Cochran,* 117 F.3d 1353 (11th Cir. 1997)[12]. As a result, such inconsistency among the circuits has left government employees exasperated when trying to comply with the law, and has undermined the credibility of the federal judiciary in these five circuits.

II. Petitioner Mills' assertion that he was terminated due to his involvement in a competing candidate's re-election campaign, an activity involving overt speech and expression of ideas, gives rise to a First Amendment free speech claim, the appropriate analysis of which is based on the *Pickering-Connick* line of cases. Consequently, the appellate court's failure to evaluate Petitioner Mills' claim under the appropriate standards set forth in *Pickering* and *Connick* resulted in the complete disregard of his First Amendment rights.

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[12]Note that there is a sharp division within the Eleventh Circuit. In another Eleventh Circuit 1997 case, *Morris v. Crow*, 117 F.3d 449 (1997), the court properly applied *Pickering*, stating that "It is important to retain the distinction between political patronage cases and free expression cases, because the analysis applicable to the types of cases is markedly different."

A. The district and appellate courts should have analyzed Petitioner Mills' claim under the *Pickering-Connick* line of cases.

Petitioner Mills asserts that he was terminated because of his involvement in Sheriff Comes' re-election campaign. Hence, Mills' claim is undeniably based on his participation in overt speech and expression of ideas, not merely on political patronage alone, and therefore his claim must be analyzed under the *Pickering-Connick* balancing test. Remarkably, the Fourth Circuit not only refused to follow this Court's holdings in *Pickering* and *Connick* when rendering its decision, but wholly ignored them. Instead, the court opted to follow its own newly created precedent in *Jenkins v. Medford, supra*, a case in which the Fourth Circuit erroneously relied on the *Elrod-Branti* analysis when deciding the same issues as those presented in the instant case.

In *Jenkins*, the appellate court did recognize that "[w]hen public employees are subjected to discipline for the content of their speech, courts analyze these claims under the *Connick-Pickering* line of cases." 119 F.3d at 1161 n.20. Nonetheless, the majority in *Jenkins* inexplicably concluded that the "[t]he wholesale dismissal of deputies who campaigned for the losing candidate ... implicates the constitutional analysis of political patronage as developed in the *Elrod-Branti* line of cases." *Id.* at 1169 (Motz, J. dissenting). There, the Fourth Circuit disregarded the directives of this Court, as well as its own precedent, in favor of "following those courts that have improperly attempted to limit the *Elrod-Branti* holdings, relying extensively on *Upton v. Thompson*, 930 F.2d 1209, 1212 (7th Cir. 1991), an opinion from the same circuit that was reversed in both *Rutan* and *O'Hare*, while ignoring more persuasive authority from other circuits." *Jenkins*, 119 F.3d at 1171 (Motz, J. dissenting). Consequently, "[the Jenkins] holding is directly contrary to the Supreme Court's directive in *O'Hare*, i.e., that the *Pickering-Connick* balancing test, rather than the *Elrod-Branti* analysis, is applicable to such claims." *Id.*

Despite such a clear objection, the appellate panel in the instant case followed this wayward line of reasoning, and in doing so committed a grave injustice by refusing to recognize Petitioner Mills' *Pickering-Connick* claim, thus depriving him of one of his most basic constitutional rights.

B. Had the Court of Appeals applied the proper analysis in considering Petitioner Mills' claim and remanded this case to the District Court, that court would have had no choice but to find that Sheriff Meadows' termination of Mills was an undeniable violation of Mills' First Amendment rights, if the alleged facts of Petitioner's claim were proven.

The *Pickering-Connick* analysis uses a two step process in determining whether or not a public employee's speech is constitutionally protected. The first inquiry is whether the employee spoke on a matter of "public concern." *Jenkins,* 119 F.3d 1169-1170 (citing *Connick*, 461 U.S. at 147-48, 103 S.Ct. at 1690-91). If so, then the trial court is required to balance "the interests of the [employee], as a citizen in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* (citing *Pickering*, 391 U.S. at 568, 88 S.Ct. at 1734-35).

In the case at bar, there can be little dispute that Petitioner Mills engaged in speech involving a matter of legitimate public concern, upon which "free and open debate is vital to informed decision-making by the electorate", *Pickering* 391 U.S. at 571-72, 88 S.Ct. at 1736, which includes speech regarding the qualifications of the candidates for the office of sheriff. "In fact, the Supreme Court has long recognized that the protection of speech discussing political candidates is at the core of the First Amendment." *Jenkins*, 119 F.3d at 1169-70 (Motz, J. dissenting) (citing *Harte-Hanks Comm., Inc. v. Connaughton*, 491 U.S. 657, 687, 109 S.Ct. 2678, 2695 (1989), *Buckley v. Valeo*, 424 U.S. 1, 14, 96 S.Ct. 612, 632 (1976); and *Pickering*,

391 U.S. at 568, 88 S.Ct. at 1734-35).

Having satisfied the "public concern" part of the analysis, step two requires the court to balance "the interests of the [employee], as a citizen in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees". *Jenkins*, 119 F.3d at 1170 (quoting *Pickering*, 391 U.S. at 568, 1734-35). In light of the alleged facts of this case, no cognizable claim that Petitioner Mills' speech interfered with the "efficiency of public services" has been set forth.

The speech in question allegedly took place away from Petitioner Mills' place of work, during off-duty hours, and prior to the election of Sheriff Meadows. It caused no disruption within the sheriff's office. Sheriff Meadows failed to produce any evidence showing that Petitioner Mills expressed any dissent or caused any disruption of any kind after Sheriff Meadows took office. Indeed, Mills told Sheriff Meadows that he was fully prepared, as a professional law enforcement officer, to serve under Sheriff Meadows with the same degree of loyalty that he had exhibited towards five previous sheriffs. Moreover, Sheriff Meadows failed to prove a compelling state interest that would outweigh Mills' First Amendment rights.

In fact, Sheriff Meadows presented absolutely no evidence to indicate that his interest in the "effective and efficient fulfillment" of his responsibilities would outweigh Mills' free speech interest. Any such claim asserted by Sheriff Meadows would have been difficult to make considering that Petitioner Mills was one of several Captains in an office of 230 people, and was not part of the "upper level command staff, which consisted of the Sheriff, his Chief Deputy, and the Bureau Commanders".

Compare Joyner v. Lancaster, 815 F.2d (4th Cir. 1987). [13]

Hence, if the Fourth Circuit had not upheld the summary dismissal of Petitioner's lawsuit, he would allegedly have been able to demonstrate that Sheriff Meadows simply did not have the right to terminate Mills for political activity, especially since that activity did not even encroach into Sheriff Meadows term of administration.

III. Even if the issue in this case were one of political patronage and not free speech, thus requiring evaluation under the *Elrod* and *Branti* line of cases, the inexplicable and arbitrary decisions by some courts of appeal (including the Fourth Circuit), holding that all deputy sheriffs, including Petitioner Mills, are subject to political patronage requirements, are inconsistent with this Court's decisions in *Elrod* and *Branti*, and have created tremendous confusion among the circuits.

A. Dismissals for reasons of political patronage violate the First and Fourteenth Amendments, unless the employing government official can show that the restriction is narrowly tailored to accomplish government interests.

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[13]Joyner is a Fourth Circuit decision where the Court of Appeals analyzed a markedly similar claim under *Pickering-Connick* (rather than *Elrod-Branti*), finding that a Sheriff's interest in the effective and efficient performance of his responsibilities to the public outweighed the First Amendment Rights of a Captain in the Sheriff's department.

The justifications for the *Joyner* decision are not present in the instant case. Firstly, not only was Joyner a captain, but he was the senior of four captains, and had only two superior officers, the Sheriff himself and the Sheriff's Major, which is a far different situation than in Mills' situation. Secondly, Captain Joyner campaigned aggressively against the incumbent sheriff while the incumbent was still in office, and his activities were "causing pervasive distrust and plummeting morale." Petitioner Mills, on the other hand, campaigned for the incumbent sheriff preceding the election. He did not show any disloyalty to Sheriff Meadows after Meadows was elected, nor did he cause any friction within the office.

In *Elrod v. Burns* and *Branti v. Finkel*, this Court held that patronage dismissals violate the First and Fourteenth Amendments, and as such constitute a valid claim for relief. 427 U.S. 347, 96 S.Ct. 2673 and 445 U.S. 507, 100 S.Ct. 1287. In *Elrod* the Court stated that "[t]he First Amendment protects political association as well as political expression" because "the right to associate with the political party of one's choice is an integral part of this basic constitutional freedom." 427 U.S. at 357, 96 S.Ct. at 2681 (citing *Buckley v. Valeo*, 424 U.S. 1, 11, 96 S.Ct. 612, 632 (1976)), further stating:

> There can no longer be any doubt that freedom to associate with others for the common advancement of political beliefs and ideas is a form of 'orderly group activity' protected by the First and Fourteenth Amendments.

Id. (citations omitted). This attitude reflects the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open, *Id.* (quoting *New York Times Co. v. Sullivan,* 376 U.S. 254, 270, 84 S.Ct. 710, 721 (1964)), a principle which demonstrates that "[c]ompetition in ideas and governmental politics is at the core of our electoral process..." *Id.* (quoting *Williams v. Rhodes,* 393 U.S. 23, 32, 89 S.Ct. 5, 11 (1968)).

While this Court clearly condemned patronage dismissals in *Elrod* and *Branti*, it did acknowledge that First Amendment rights are not absolute, and that there are instances when the government may curtail these rights. 427 U.S. at 347, 96 S.Ct. at 2677 (citing *Buckley,* 424 U.S. at 94, 96 S.Ct. at 612). In determining whether the government's direct or indirect impairment of a public employee's First Amendment rights is justified, this Court must decide if the impairment survives strict scrutiny. *Rutan v. Republican Party of Illinois,* 497 U.S. 62, 98, 110 S.Ct. 2729, 2749 (1990) (Scalia, J. dissenting). Thus, the encroachment "cannot be justified upon a mere showing of a legitimate state interest", *Elrod,* 427 U.S. at 362, 96 S.Ct. at

2684 (citing *Kusper v. Pontikes*, 414 U.S. 51, 58, 94 S.Ct. 303, 308(1973)), but in fact, can be justified only if the government can prove the interest is "narrowly tailored to further vital government interests." *Rutan,* 497 U.S. at 74, 110 S.Ct. at 2736. Therefore, if the government compels a public employee to support the "in-party" in order to keep his job, the requirement "must further some vital government end by a means that is least restrictive of freedom of belief and association in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights" in order to survive constitutional challenge. *Elrod*, 427 U.S. at 363, 96 S.Ct. at 2685. Consequently, *Elrod* limited the validity of political patronage dismissals to positions involving policymaking and/or confidential information. 427 U.S. at 367, 96 S.Ct. at 2687.

Subsequently, this Court revisited the issue four years later in *Branti.* There, it significantly revised the *Elrod* formulation and narrowed public employers' ability to discharge employees for political reasons, by asking, instead, "whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." 445 U.S. at 518, 100 S.Ct. at 1295. What this exactly means, however, is the source of much controversy among the circuit courts of appeal, resulting in a flurry of inconsistent holdings. *Rutan,* 497 U.S. 62, 111, 110 S.Ct. 2729, 2756 (Scalia, J. dissenting).

B. Under *Elrod* and *Branti*, the position of deputy sheriff does not summarily qualify and should not therefore be automatically designated as an office for which party affiliation is an appropriate requirement for the effective performance of the officer's duties. Hence, the courts must analyze each case individually in order to determine whether political patronage is a valid requirement for the office in question.

In *Jenkins*, the Fourth Circuit ignored the directives set forth by this Court in *Branti*, and instead chose to apply the *Elrod*

standard when reviewing the case. In so doing, the court decided that the office of deputy sheriff is always a policymaking position despite the court's own previous rulings. *See, e.g., Jones v. Dodson,* 727 F.2d 1329 (4th Cir. 1984)[14] . Such a holding is also contrary to other circuits, which have held that the political affiliation of a deputy sheriff is not essential to the discharge of the deputy's duties. *See, e.g., Burns v. County of Cambria, Pennsylvania*, 971 F.2d 1015 (3d Cir. 1992) *cert. denied,* 506 U.S. 1081 (1993); *Brady v. Fort Bend County*, 145 F.3d 691 (5th Cir. 1998); *Hall v. Tollett*, 128 F.3d 418 (6th Cir. 1997); *Hansen v. White*, 947 F.2d 1378, 1380 (9th Cir. 1991); and *Dickenson v. Quarberg*, 844 F.2d 1435 (10th Cir 1988).

In so doing, the Fourth Circuit, in this case and in *Jenkins,* has ignored the decisions of this Court, as well as those of other circuits, which have limited such dismissals by actually examining "whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved", in favor of "following those courts that have improperly attempted to limit the *Elrod-Branti* holding...", *Jenkins,* 119 F.3d at 1156, 1171 (Motz, J. dissenting), in cases such as *Upton v. Thompson,* 930 F.2d 1209 (7th Cir. 1991) and *Cutcliffe v. Cochran*, 117 F.3d 1353 (11th Cir. 1997).[15]

Under either *Branti* or *Elrod*, the office of deputy sheriff does not automatically fall within the classification of positions

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[14]Wherein the court stated "[W]e do not believe that the duties of deputy sheriffs, no matter what the size of the office, or the specific position of the power involved, or the customary intimacy of the association of the office, or the undoubted need for mutual trust and confidence within any law enforcement agency, could be found to involve policymaking related to partisan political interests and involve access to confidential information bearing ... on partisan political concerns."

[15]These cases held that a sheriff's termination of deputy sheriff on the basis of loyalty and support for the former sheriff does not violate the First Amendment.

that require political patronage. As was the case with *Branti*, where this Court rejected political patronage requirements placed upon public defenders, sheriff's deputies usually have broad responsibilities with respect to particular duties assigned to them, but have little, if any, responsibility with respect to the overall operation of the office in which they are employed. 445 U.S. at 511, 100 S.Ct. at 1291. In fact, "[a] significant body of circuit court precedent suggests that *Branti's* definition of the range of jobs legitimately subject to patronage removal is 'extremely narrow.'"[16] For example, as J. Michael McGuinness has observed:

> The First Circuit has developed a substantial body of jurisprudence in these cases. In *Ortiz-Pinero v. Rivera-Arroyo*, 84 F.3d 7 (1st Cir. 1996), the court summarized the doctrine within the First Circuit. In determining whether a government position is "political" [the First Circuit] does not depend upon loose fitting labels such as "confidential" or "policymaking," but rather on the substance of the duties inherent in the position itself. First, [does] the overall function of the employee's department involve "decision making on issues where there is room for political disagreement on goals or their implementation." Second, [do] the particular responsibilities of the plaintiff's position resemble those of a "policymaker, privy to confidential information, a communicator, or some other office holder whose function is an equally appropriate requirement" for continued employment. Factors relevant to the second element include the relative pay, technical competence, power to control others, authority to speak in the name of policymakers, public perception, influence on programs, contact with elected

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[16]McGuinness, *supra* note 9, at 74 (citing *Jones v. Dodson*, 727 F.2d at 1335 note 6 and *McDonald v. Adams*, 829 F.2d 1319 (4th Cir. 1987)).

officials, and responsiveness to partisan politics and political leaders. Determining whether a position is political for purposes of the *Branti* analysis is a question of law for the court.[17]

C. Under *Elrod and Branti*, Sheriff Meadows' termination of Petitioner Mills for reasons of political patronage, if proven, violate the First and Fourteenth Amendments.

The required *Elrod-Branti* analyses are especially applicable in the instant case, as the facts in both *Elrod* and the instant case are strikingly similar. Both cases involve the dismissal of deputy sheriffs, who were not protected by law from arbitrary discharge for reasons of political patronage. John Burns, respondent in *Elrod v. Burns,* was employed by Cook County, Illinois, Sheriff's Office as Chief Deputy of the Process Division.[18] This position required Burns to supervise employees and departments within the Sheriff's Office. Nevertheless, this Court found:

> It was clear that the duties of the employees--the chief deputy of the process division of the sheriff's office, a process server and another employee in that office, and a bailiff and security guard at the Juvenile Court of Cook County--were not of that character, for they were, as Mr. Justice Stewart stated "nonpolicymaking, nonconfidential government employees".

Branti, 445 U.S. at 517, 100 S.Ct. at 1294 (quoting *Elrod*, 427 U.S. at 375, 96 S.Ct. at 2690).

In comparison, the Petitioner in the case at hand, Marlin

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[17] *Id.* at 74-75.

[18] John Burns was the named plaintiff in a class action suit which involved other claimants.

Mills, served the Harford County Sheriff's Office with distinction for 23 years, under five separate sheriffs, rising to the rank of captain. As a captain, however, Mills was not part of the Respondent sheriff's upper level command staff, which consisted of the sheriff, his chief deputy, and the bureau commanders. Petitioner Mills, as a captain, was below this level, along with numerous other captains, lieutenants, sergeants, corporals, and deputies comprising an office of approximately 230 people. Within that hierarchy, Mills was required to follow the directives and policies established by his sheriff and superiors. In fact, political affiliation and activities played *no* part of Mills job responsibilities. And while Petitioner Mills did support the incumbent sheriff, a fellow Democrat, when he ran for re-election, he never conducted any type of political activity during business hours or otherwise while on the job, before or after Sheriff Meadows was elected. Further, Mills was fully prepared to serve Sheriff Meadows loyally, as he had five other sheriffs, and informed Sheriff Meadows of those intentions.

More importantly, however, is the fact that Sheriff Meadows provided no evidence to support a claim that "party affiliation is an appropriate requirement for the effective performance" of Petitioner Mills job, nor did Sheriff Meadows establish an overriding interest of vital importance that would require Mills' personal beliefs to conform to those of the Sheriff, as required by *Branti*. In fact, in Sheriff Meadows' affidavit he admitted that party "affiliation had absolutely nothing to do with who I appointed" even in the case of upper level command positions.

Nevertheless, the District Court and the Court of Appeals inexplicably found that political affiliation was an appropriate requirement not only for Petitioner Mills, but for all Maryland deputy sheriffs, stating: "[*Jenkins*] noted that sheriffs ... are 'important political figure[s]' who are responsible for implementing a political agenda that has been approved by the voters through the sheriff's election" and that "a deputy sheriff is the alter ego of the sheriff...", thus finding that party affiliation

is an appropriate requirement for the office of deputy sheriff because "sheriffs, as elected officers, require loyal deputies to help them implement their policies-- 'policies presumably sanctioned by the electorate'", *Mills,* 1999 U.S. App. LEXIS 16895 (quoting *Jenkins*, 119 F.3d at 1163), a proposition that was undeniably refuted in *Elrod.*

IV. If a public employee is dismissed for reasons that infringe upon the employee's constitutionally protected interests, it is immaterial whether or not the employee had a property interest in his position, hence the appellate court erred in considering Petitioner Mills' "at will" status as a factor in its analysis.

Until the 1950s and early 1960s, a public employee had no right to object to conditions placed upon the terms of employment, even if those conditions infringed upon the employee's constitutional rights. *Connick*, 461 U.S. at 144, 103 S.Ct. at 1688. Since then, however, this Court has rejected that theory. It has invalidated statutes and actions that have limited the rights of public employees to participate in public affairs, stating that "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Id.* (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74-75, 85 S.Ct. 209, 215-216 (1964)). In fact, the Court has frequently reaffirmed that speech on public issues occupies the "highest rung of the hierarchy of First Amendment values, and is entitled to special protection. *Id.* (citations omitted). As such, the government cannot legitimately prevent or chill government employees from joining political parties and other associations, nor can it infringe upon the employees' freedom of speech concerning matters of public concern. *Connick*, 461 U.S. at 1454-55, 103 S.Ct. at 1689.

These holdings afford public employees First Amendment protections regardless of whether the employees have a property interest in their employment or can be dismissed "at will." In *Elrod*, this Court reiterated the principle first set forth in

Keyishian, where this Court rejected "[t]he theory that public employment which may be denied altogether, may be subjected to any conditions, regardless of how unreasonable...", *Elrod* at 427 U.S. at 361, 96 S.Ct. 2683(quoting *Keyishian v. Board of Regents*, 385 U.S. at 589, 605-606, 87 S.Ct. 675, 685 (1967)), and it stated:

> [E]ven though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely.

Id. (quoting *Perry v. Sindermann*, 408 U.S. 593, 597, 92 S.Ct. 2694, 2697 (1972)). For instance, it may not deny employment to a person on a "basis that infringes his constitutionally protected interests — especially his interest in freedom of speech." *Perry*, 408 U.S. at 597, 92 S.Ct. at 2697-98 (1972). Subsequently, this core principle has been repeatedly applied to public employment, providing protection to employees regardless of their contractual or other claim to a job. *Id.* (comparing *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731 (1968) with *Shelton v. Tucker*, 364 U.S. 479, 81 S.Ct. 247 (1960).[19] Hence, the lower court's reliance on Petitioner Mills' status as an "at will" employee as a factor in its analysis is errant and in clear contradiction to Supreme Court precedent.

CONCLUSION

For all of the foregoing reasons, *amicus curiae* National Association of Police Organizations urges this Court to accept review of this case in order to clarify the law regarding the issues of free speech and political patronage presented by this case and to resolve the inconsistent application of the law

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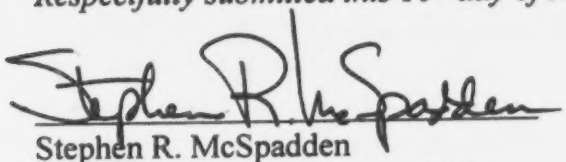
[19]The same principle applies to certain statutory provisions as well. For example, under Title VII, Civil Rights Act of 1994, an "at-will" employee cannot be discharged on the basis of race or gender.

throughout the country. These are significant constitutional issues which have not been resolved and are therefore the source of an ever-widening split among the circuit courts. Guidance from this Court would clarify the First Amendment rights of government employees, especially law enforcement officers who are ready on short notice to place their life in harm's way to protect others.

Therefore, *amicus curiae* respectfully requests that this Honorable Court grant the instant petition for writ of certiorari to review the judgment of the Fourth Circuit Court of Appeals.

Respectfully submitted this 10th day of November, 1999,



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(3)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

MARLIN LEE MILLS,

Petitioner,

v.

JOSEPH P. MEADOWS, ET AL,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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1738

QUESTIONS PRESENTED FOR REVIEW

1. Did the Fourth Circuit properly apply the *Elrod-Branti* analysis to the alleged patronage dismissal of a high ranking Harford County deputy sheriff?

2. Was the *Elrod-Branti* analysis appropriate?

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ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner, Marlon Lee Mills ("Mills"), appealed from an Order of the District Court of Maryland granting summary judgment to Respondents. The Opinion and Order concluded that Sheriff Joseph P. Meadows ("Meadows") could terminate Mills, a high-ranking deputy sheriff in Harford County, Maryland, on the basis of his political affiliation without violating the First Amendment. Pet. App. A-7 to A-18. The Fourth Circuit Court of Appeals affirmed in an unpublished opinion.[1] Pet. App. A-1 to A-6. The facts developed in the summary judgment record are set forth viewed in the light most favorable to Mills.

In 1971, Robert Coomes (later Sheriff Coomes) hired Mills as an entry level deputy with the Harford County Sheriff's Office. J.A. 7,8. Over the years, Mills was promoted to the rank of deputy first class, corporal, sergeant, lieutenant, and finally captain. Mills received his last two promotions during the administration of Sheriff Coomes, who was elected in 1990. J.A. 61. As a captain in the Coomes administration, Mills was a high ranking official. In a department of 230 deputies, Mills was one of only seven captains and was exceeded in rank by only four individuals, including Sheriff Coomes himself. J.A. 59-60, 64.

In 1994, Sheriff Coomes, a Democrat, ran for reelection against Joseph P. Meadows, a Republican. Pet. 3. At

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[1] Mills named Sheriff Joseph P. Meadows and Harford County as defendants in this action. Harford County bears no liability as the sheriff is an independent state officer and is not an agent or employee of the County. *Rucker v. Harford County, Md.*, 558 A.2d 399, 402, 406 (Md. 1989); *MacMillian v. Monroe County, Ala*, 520 U.S. 781 (1997). Because the County's liability, if any, would have derived solely from Meadows' action in his official capacity, the lower Courts did not confront the County's lack of derivative liability.

the time, Mills was the President of the Harford County Democratic Club. *Id.* Mills actively supported Coomes in the election, displaying Coomes' campaign sign and hosting a fundraiser at the private swim and golf club owned by Mills. J.A. 61-62, 105. Meadows defeated Coomes in the November 1994 general election, becoming the first Republican sheriff in Harford County history. Pet. 2, 3.

In securing victory, Meadows' campaign had pointed to negative incidents and perceptions of mismanagement by the Coomes administration. J.A. 59, 66-69. One major incident involved the death of an inmate. *Id.* Although the death was announced as a suicide, the inmate's family suspected foul play by deputy sheriffs and alleged sodomy and murder. *Id.; See, Zepp v. Rehrmann*, 79 F.3d 381, 383-84 (4th Cir. 1996). The case was settled during the Coomes administration for $400,000.00. *Id.* Although Mills denied any role, as the District Court pointed out, "Meadows could proper[l]y interpret the outcome of the election as a mandate for change, imposing upon him the responsibility to put in place a management team that could effect that change." Pet. App. A-8.

Aside from being the first elected Republican Sheriff in Harford County history, Meadows was a former prosecutor without prior experience as a law enforcement officer. J.A. 60. Thus it was all the more critical that Meadows put in place a management team which he could trust to devise and implement new policies reflective of his campaign promises to the electorate. *Id.* Towards this end, on December 6 and 7, 1994, Meadows met with members of the upper level command staff including Mills. J.A. 60-61.

During the meeting with Mills, Meadows explained that he was unsure of Mills future status in the organization and advised that he would make a decision in the near future. *Id.*

Thereafter, Meadows learned that no member of the upper level command staff wanted to work with Mills, and many lower level deputies "expressed concerns about Mills' police and command acumen." J.A. 61-63. Approximately two weeks after the initial meeting, Meadows informed Mills that he had decided not to reappoint him. J.A. 63, 106. Later that day, Mills took early retirement effective January 1, 1995. J.A. 106.

Mills subsequently filed this action pursuant to 42 U.S.C. §1983, alleging that Meadows terminated him based upon his political affiliation and campaign activities in violation of the First Amendment. Both the District Court of Maryland and the Fourth Circuit Court of Appeals concluded that Meadows was entitled to summary judgment on this issue.

REASONS FOR DENIAL OF THE PETITION FOR CERTIORARI

The Fourth Circuit correctly applied the precedents of this Court to Meadows' termination of Mills. No conflict exists between the circuits with regard to the alleged political discharge of a high ranking deputy sheriff in Harford County, Maryland in 1994. No prior political affiliation case addressed the dismissal of Harford County deputy sheriffs, much less Mills' particular position. State law and the role of deputy sheriffs vary from state to state. The Fourth Circuit's unpublished decision in this case has very narrow application, not extending beyond the analysis of Mills' position in the Harford County Sheriff's Office. Review of this limited fact pattern, unlikely to be repeated, would lend no guidance to lower courts; particularly where, as here, the case fits squarely within the analytical framework of this Court's prior precedents. This case does not merit the scrutiny of this Court.

1. The Fourth Circuit Properly Applied The *Elrod-Branti* Analysis.

In *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980), this Court determined that the dismissal of government employees based upon their political affiliation was unconstitutional, subject to certain exceptions. At the time of these decisions, the tradition in many political subdivisions was to staff public offices with patronage appointments in the wake of elections. *Elrod* and *Branti* limited this practice to certain public offices, thereby curtailing widespread patronage.

In *Elrod*, employees of the Cook County, Illinois Sheriff's Office claimed that a newly elected sheriff violated their First Amendment rights when he laid them off because they were not members of the "proper" political party. By a plurality, the Court found that a "non-policy making, non-confidential government employee can[not] be discharged or threatened with discharge from a job that he is satisfactorily performing upon the sole ground of his political beliefs." *Elrod,* 427 U.S. at 375 (Stewart, J. concurring). However, the Court simultaneously carved out an exception permitting patronage dismissals of employees holding "policymaking" positions. *Id.* at 367. The Court remanded the case for consideration of whether any of the discharged employees qualified as policymakers. *Id.* at 368. The rationale for the *Elrod* policymaker exception related to the public need to insure representative government responsive to the electorate.

> A second interest advanced in support of patronage is the need for political loyalty of employees, not to the end that effectiveness and efficiency be insured, but to the end that representative government not be undercut by

> tactics obstructing the implementation of policies of the new administration, policies presumably sanctioned by the electorate. The justification is not without force, but is nevertheless inadequate to validate patronage wholesale. Limiting patronage dismissals to policymaking positions is sufficient to achieve this governmental end. Nonpolicymaking individuals usually have only limited responsibility and are therefore not in a position to thwart the goals of the in-party.

Elrod, 427 U.S. at 367.

In *Branti v. Finkel,* 445 U.S. 520 (1980), the Court revisited the issue of patronage dismissals. Finding that assistant public defenders in Rockland County New York could not be subject to dismissal on the grounds of political affiliation, the *Branti* decision refined the "policymaker" exception described in *Elrod.*

> In sum, the ultimate inquiry is not whether the label "policymaker" or "confidential" fits a particular position; rather the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.

Branti, 445 U.S. at 518.

Branti requires courts to analyze "the public office involved" to determine as a matter of law whether political affiliation is an appropriate requirement for that particular position. The assistant public defenders in *Branti* had "'very

limited, if any, responsibility' with respect to the overall operation of the public defender's office." *Id.* at 511. Therefore, their political affiliation was not an appropriate consideration.[2] *Id.* at 519-20.

Both *Elrod* and *Branti* require that courts inquire on a case by case basis whether political affiliation is an appropriate consideration for the positions in question. *Elrod,* 427 U.S. at 367-68; *Branti,* 445 U.S. at 519. Following these precedents, the Courts of Appeals, including the Fourth Circuit, focus on the position involved to determine whether political loyalty or affiliation are appropriate considerations. *Jimenez Fuentes v. Torres Gaztambide,* 807 F.2d 236, 241-42 (1st Cir. 1986), *cert. denied,* 481 U.S. 1014 (1987); *McEvoy v. Spencer,* 124 F.3d 92, 98 (2nd Cir. 1997); *Burns v. County of Cambria,* 971 F.2d 1015, 1022 (3rd Cir. 1992); *Jenkins v Medford,* 119 F.3d 1156, 163-4 (1997) (*en banc*), *cert. denied* 118 S.Ct. 881 (1998); *Hall v. Tollett,* 128 F.3d 418, 423 (6th Cir. 1997); *Tomczak v. City of Chicago,* 765 F.2d 633, 640 (7th Cir.), *cert. denied,* 474 U.S. 946 (1985); *Fazio v. City of San* Francisco, 125 F.3d 1328, 1332 (9th Cir. 1997); *Dickson v. Quarberg,* 844 F.2d 1435,-1442 (10th Cir. 1988); *Terry v. Cook,* 866 F.2d 373, 378 (11th Cir. 1989).

Neither *Elrod, Branti,* nor prior decisions from any Circuit directly answer the question of whether political affiliation is an appropriate requirement for a high ranking deputy sheriff in Harford County, Maryland. *Elrod* concerned non-law enforcement employees of the Cook County, Illinois Sheriff. *Elrod,* 427 U.S. at 351. Moreover, this Court did not

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[2] "This is in contrast to the broader public responsibilities of an official such as a prosecutor. We express no opinion as to whether the deputy of such an official could be dismissed on grounds of political party affiliation or loyalty." *Branti,* 445 U.S. at 519, n 13.

decide whether these positions were the type for which political considerations apply, instead remanding the case for consideration of the issue. *Id.* at 368. *Branti* considered a public defender's position in Rockland County, New York and thus also does not directly address the instant case. *Branti,* 445 U.S. at 508.

Nonetheless, the Fourth Circuit applied the *Elrod-Branti* analysis in the instant case by examining Mills' position as a high ranking deputy sheriff in Harford County, Maryland. Pet. App. A-4. Both the District and Circuit Courts below referred to the *Elrod-Branti* analysis conducted by the Fourth Circuit *en banc* in *Jenkins v. Medford,* 119 F.3d 1156 (4th Cir. 1997) (*en banc*), *cert. denied*, 118 S.Ct. 881 (1998); Pet. App. A-4, A-12.

In *Jenkins,* the Fourth Circuit reviewed the claims of several deputy sheriffs against the newly elected Sheriff of Buncombe County, North Carolina. The deputies, who supported the Sheriff's political opponents during the campaign, alleged that their terminations violated the First Amendment. *See, Id.* at 1158-59.

Applying *Elrod–Branti,* the Court considered "the specific political and social roles of sheriffs and their deputies in North Carolina" and noted that sheriffs in that state are "important political figure[s]" who are responsible for implementing a political agenda that has been approved by the voters through the sheriff's election. *Jenkins,* 119 F.3d at 1163. The Court observed that a North Carolina deputy sheriff is the alter ego of the Sheriff, who can be held liable for a deputy's misconduct. Based upon these considerations, the Fourth Circuit held that party affiliation was an appropriate requirement for the office of a sworn law enforcement deputy sheriff in North Carolina. *Id.* at 1164.

In the present case, the Fourth Circuit noted that Maryland, like North Carolina, considers a deputy sheriff to be the alter ego of the sheriff. *Pet. App.* A-5; *Rucker v. Harford County,* 558 A.2d 399, 402, 406 (Md. 1989). In fact, under Maryland law, the sheriff and his deputy are considered one and the same officer, exercising the same authority and performing the same duties. *Rucker,* 558 A.2d at 406-7. In addition to this substantial autonomy and discretion accorded by law to Maryland deputies, the Fourth Circuit relied upon the fact that Mills was a high ranking official. In a department of two hundred thirty deputies, he was one of only seven captains and exceeded in rank by only four individuals, including the sheriff himself. *Pet. App.* A-5. The Petition ignores this salient and dispositive fact.

Contrary to Mills' assertion in his Petition, the Fourth Circuit has not "provided sheriffs with the unfettered discretion to dismiss deputies from another party." Pet. 13. The Fourth Circuit's unpublished opinion in this case analyzes only a single position, one of the highest ranking positions in a department consisting of 230 deputies. *Pet. App.* A-5. That unique analysis has narrow application and establishes limited precedent. The Fourth Circuit's unpublished opinion in the present case has more narrow implications for deputy sheriffs in Harford County than its prior published decision in *Jenkins* has for deputy sheriffs in North Carolina. Aside from disfavored status as an unpublished opinion,[3] the Fourth Circuit's decision in *Mills* applies only to the highest ranking Harford County deputy sheriffs.

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[3] Fourth Circuit Local Rule 36(c) states that citation of unpublished dispositions is disfavored except for establishing res judicata, estoppel, or the law of the case.

The fact that courts in other jurisdictions have reached "different" results does not warrant review by this Court. The positions examined by courts in patronage dismissal cases vary as widely as the procedural and substantive court records upon which various decisions are based. The responsibilities of deputy sheriffs vary from state to state, and county to county, depending upon state and local law. Deputy sheriffs encompass positions from clerical assistants to civil process servers, jailers, security guards, or sworn law enforcement officers. A deputy's responsibility may range from performing low level ministerial tasks, such as serving civil summons to a high ranking official with substantial discretion and autonomy like Mills.

For example, *Jenkins* applied only to North Carolina deputy sheriffs actually sworn to engage in law enforcement activities on behalf of the sheriff. *Jenkins,* 119 F.3d at 1165. In *Terry v. Cook,* the Eleventh Circuit drew a distinction between the Alabama chief deputy/deputies (the alter ego of the sheriff empowered under Alabama law to enter into business transactions for the sheriff) and clerks, dispatchers, jailers and process servers working for the sheriff, remanding for further consideration whether the responsibilities of the latter positions required political loyalty to the sheriff. *Terry v. Cook,* 866 F.2d 373, 377-378 (11th Cir. 1989). In *Burns v. County of Cambria*, 971 F.2d 1015, 1022 (3rd Cir. 1992), the Third Circuit concluded on the basis of the record before the Court that Cambria County deputy sheriffs whose primary duties were serving process, transporting prisoners, and courtroom security did not have significant autonomy or discretion in their jobs demonstrating the relevance of political affiliation. The record before the Sixth Circuit was similarly inadequate to establish that political affiliation was an appropriate requirement for the effective performance of rank and file Cumberland County, Tennessee deputy sheriffs

(noting that the sheriff may be able to establish this proposition affirmatively in future cases). *Hall v. Tollett*, 128 F.3d 418, 429 (6th Cir, 1997). However, the Sixth Circuit did find, in the same case, that the Sheriff was entitled to select a chief deputy who shared his political beliefs because the position had a high level of discretion and authority. *Id.* at 425-426.

The record in instant case amply establishes that Mills' position operated with sufficient discretion and autonomy to warrant consideration of his political beliefs by Meadows. As the District Court of Maryland observed:

> As a captain, Mills was a highly placed official in the Coomes administration. Though he denies being a part of Coomes' upper level command staff, the record is clear that only a handful of individuals within the 230 member agency had attained an equal or higher rank. As a result he necessarily served as a link between the sheriff and the deputies in the agency, and played a significant role in the implementation of the sheriff's policies. Thus, Meadows could lawfully terminate Mills for political reasons under the *Elrod-Branti* exception to prohibited political terminations.

Pet. App. A-13.

2. The *Elrod-Branti* Analysis Was Appropriate In This Case.

Mills alleges that he was terminated for supporting and associating politically with Meadows' political opposition. J.A. 10. These are classic allegations of political patronage. The

tests in *Elrod* and *Branti* are specifically designed to deal with such allegations.

However, Mills contends that in addition to the *Elrod-Branti* analysis conducted by the Fourth Circuit, this Court should grant review to determine whether the case should be analyzed under *Pickering v. Board of Education,* 391 U.S. 563 (1968) and *Connick v. Myers,* 461 U.S. 146 (1983).

Pickering involved the dismissal of a high school teacher in Will County, Illinois for openly criticizing the local Board of Education for its handling of revenue raising proposals. *Pickering,* 391 U.S. at 564. *Connick* involved the dismissal of an assistant district attorney in New Orleans, Louisiana for circulating a questionnaire concerning several internal office issues including whether employees felt pressure to work in political campaigns. *Connick,* 461 U.S. 141. Thus, *Connick* and *Pickering* involved free speech claims unrelated to patronage allegations. Neither case involved a patronage dismissal of a high ranking employee in the wake of an election based upon political affiliation or support.

Mills' request that this Court review this case to determine if a *Connick-Pickering* analysis applies is baseless. Mills' complaint alleges a patronage dismissal. Mills has not identified any speech of the type present in *Connick* or *Pickering* in support of his claim.

Mills reliance on *O'Hare Truck Services v. City of Northlake,* 518 U.S. 712 (1996) for his argument that a *Connick-Pickering* analysis should be used in the instant case is misplaced. *O'Hare* dealt with extending patronage protections afforded public employees to independent contractors who refuse to support a candidate and instead

support that candidate's political opposition. *Id.* at 715. This Court did not require that a *Connick-Pickering* analysis be applied in *O'Hare*. Significantly, *O'Hare* was construed as "simply an affiliation case" requiring an *Elrod-Branti* analysis.[4] *O'Hare*, 518 U.S. at 714-715, 720.

Mills, in the instant case, alleges he lost his job because of his political affiliation and support of Meadows' political opponent. Such a claim falls squarely under the *Elrod-Branti* political patronage analysis and not the *Connick Pickering* free speech analysis. There is no need to apply *Connick-Pickering* in this case.

CONCLUSION

For the reasons set forth herein, the Petition for Certiorari should be denied.

Respectfully submitted,

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[4] Although construed as a political affiliation case at the motion to dismiss stage, this Court left the lower courts on remand to decide whether the case would be governed by *Elrod-Branti* or *Pickering* at the summary judgment stage. *O'Hare*, 518 U.S. at 726. This tacit acknowledgement that the summary judgment record may support *Connick-Pickering* claims in *O'Hare* does not advance Mills' argument. No speech of the Connick-Pickering variety is evident in the summary judgment record in the instant case.